No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

MILTON DEAN BATCHELDER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

SIDNEY M. GLAZER
WILLIAM C. BROWN
Attorneys
Department of Justice
Washington, D.C. 20530

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CITATIONS

Cases:

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MILTON DEAN BATCHELDER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-31a) is reported at 581 F.2d 626.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 32a-33a) was entered on July 24, 1978. A

petition for rehearing was denied on September 12, 1978 (App. C, *infra*, 34a-35a). On October 2, 1978, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including November 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prison sentence imposed on a defendant convicted under 18 U.S.C. 922(h), which carries a maximum five-year term, must be limited to two years if his conduct also violated 18 U.S.C. App. 1202(a), which carries only a two-year term.

STATUTES INVOLVED

18 U.S.C. 921(a) provides in pertinent part:

> As used in this chapter—
>
> * * * * *
>
> (14) The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.
>
> (15) The term "fugitive from justice" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.
>
> * * * * *
>
> (20) The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar

> offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 922(h) provides:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 924(a) provides:

> Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license of

exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

18 U.S.C. App. 1202(a) provides:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or,

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. 1202(c) provides in pertinent part:

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less; * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, respondent, a previously convicted felon, was convicted of having received a firearm that had been shipped in interstate commerce, in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment. The court of appeals affirmed respondent's conviction but vacated the district court's judgment and remanded the case in order for respondent to be resentenced to a maximum term of two years' imprisonment (App. A, *infra*, 1a-31a). One member of the panel dissented from the vacation of the judgment and remand for resentencing (*id.* at 23a-31a).

1. The evidence at trial showed that on July 24, 1975, Russel Koch, an undercover agent of the Bureau of Alcohol, Tobacco and Firearms, accompanied an informant to Carl's Bar in Bellevue, Illinois, where respondent was employed (Tr. 58-61). Respondent, who had been convicted of a felony in 1960, showed Agent Koch a .38 caliber revolver he was wearing in a waist holster and suggested that Koch could borrow the revolver or buy it for $110 (Tr. 57, 63-64). One week later Agent Koch returned to the bar and purchased the revolver from respondent for $70 (Tr. 63-67). Respondent stipulated that the revolver had been shipped from Massachusetts to Missouri in 1948 (Tr. 57).

On appeal a divided panel affirmed respondent's conviction but reversed and remanded for resentencing to a maximum term of two years' imprisonment.

Although the majority opinion acknowledged that respondent had been indicted and convicted under 18 U.S.C. 922(h) and that 18 U.S.C. 924(a) clearly provided that such violations were subject to a maximum penalty of five years' imprisonment, or a fine of $5,000, or both, it found that the substantive elements of Section 922(h)—at least as applied to a convicted felon who receives a firearm—were identical to those of 18 U.S.C. App. 1202(a), which provides for a maximum sentence of only two years' imprisonment (App. A, *infra*, 4a & n.2). The court concluded that, in these circumstances, it was "impermissible to sentence a defendant to five years in prison under Section 922(h) when he could receive only a two-year maximum sentence under Section 1202(a)." In the court's view, since Sections 922(h) and 1202(a) "arguably contradict each other and therefore leave the intent of the legislators ambiguous" (*id.* at 7a), its construction was required to avoid the "difficult constitutional questions" posed by the fact that Sections 922(h) and 1202(a) "provide different penalties for identical conduct" (*id.* at 16a; footnote omitted).

Judge McMillen dissented from the vacation of respondent's sentence, finding persuasive "the long line of cases * * * which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if the defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants" (App. A, *infra*, 24a). Judge McMillen conceded that this rule "is most often stated in terms of two statutes prohibiting the same act but requiring different elements of proof," but he could see no argument that "the prosecutor's discretion is any less when statutes also overlap on the question of punishment, if the defendant's behavior can render him subject to either" (*id.* at 24a-25a).

REASONS FOR GRANTING THE PETITION

In ruling that a sentence imposed for a violation of 18 U.S.C. 922(h) may not exceed two years' imprisonment, the court of appeals has disregarded an express statutory provision allowing a maximum term of five years and has sharply restricted the discretion conferred by Congress upon prosecutors and trial judges in an important category of federal gun control offenses. The court's decision is also inconsistent with numerous decisions by this Court and the courts of appeals holding that when conduct violates more than one criminal statute the prosecutor may select the appropriate charge regardless of the respective penalties, and it conflicts with decisions in the Fifth, Sixth and Eighth circuits applying that principle in cases involving the overlap between Sections 922 and 1202. Finally, the court of appeals' conclusion that its patent reconstruction of Section 922(h) was warranted to avoid constitutional questions contravenes this Court's repeated pronouncement that, even where constitutional questions are raised, a statute must be construed in a way that is fairly possible in light of its language.

If permitted to stand, this decision will greatly reduce the effectiveness of significant and frequently invoked provisions of the federal gun control laws, will establish inconsistent sentencing schemes in the various circuits, and will encourage challenges to the legality of sentences previously imposed under Section 922(h). The issue presented is important to the proper administration of the federal criminal laws, and it warrants review by this Court.

1. The statute under which petitioner was convicted, 18 U.S.C. 922(h), prohibits any person who is under indictment or who has previously been convicted of a crime punishable by imprisonment for a term in excess of one year "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The relevant penalty provision, 18 U.S.C. 924(a), provides in unmistakable terms that persons found guilty of violating Section 922 "shall be fined not more than $5,000, or imprisoned not more than five years, or both." 18 U.S.C. App. 1202(a), in contrast, reaches not only receipt, but also possession or transfer of any firearm "in commerce or affecting commerce" by any person who "has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony," [1] and provides for a maxi-

[1] Sections 922(h) and 1202(a) are not coextensive. In addition to felons, Section 922 covers (1) fugitives from justice, (2) unlawful drug users or addicts, and (3) persons who have been adjudicated as "mental defectives" or who have been committed to a mental institution, while Section 1202(a) covers

mum penalty of a $10,000 fine, two year's imprisonment, or both.

Respondent's conduct in receiving a firearm after having been convicted of a felony thus violated both Section 922(h) and Section 1202(a). It is well settled by decisions in this Court and the courts of appeals that where, as here, an act violates more than one criminal statute, the prosecutor has discretion to select the appropriate charge, regardless of the respective penalties. See, *e.g. United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *United States* v. *Gilliland*, 312 U.S. 86 (1941); *United States* v. *Harris*, 558 F.2d 366, 368 (7th Cir. 1977); *United States* v. *Brewer*, 528 F.2d 492, 498 (4th Cir. 1975). See also *United States* v. *Bishop*, 412 U.S. 346 (1973); *Sansone* v. *United States*, 380 U.S. 343 (1965). Simply put, "[a] defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution. That choice is to be made by the United States Attorney." *Hutcherson* v. *United States*, 345 F.2d 964, 967 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965).

(1) persons who have been adjudged "mentally incompetent," (2) persons with dishonorable discharges from the Armed Forces, (3) persons who have renounced their United States citizenship, and (4) aliens illegally or unlawfully in the United States. Moreover, the overlap as to convicted felons is not complete. For example, because of definitional differences, persons convicted of felonies pertaining to antitrust violations and certain similar offenses are exempted from the proscriptions of Section 922(h). Compare Section 921(a)(20) with Section 1202(c).

The court of appeals' decision in the instant case is inconsistent with this settled principle and in direct conflict with at least four court of appeals decisions that have applied the rule in cases involving the overlap between Sections 922 and 1202. *United States* v. *Thrasher*, 569 F.2d 894 (5th Cir. 1978), cert. denied, No. 77-6573 (October 2, 1978), and *United States* v. *Phillips*, 522 F.2d 388 (8th Cir. 1975), concerned the overlap between Sections 922(h) and 1202(a), while in *Mauney* v. *United States*, 454 F.2d 273 (6th Cir. 1972), and *United States* v. *Fournier*, 483 F.2d 68 (5th Cir. 1973), the courts affirmed prison sentences in excess of two years for violations of 18 U.S.C. 922(g) (which bars convicted felons from transporting firearms in interstate commerce) although the maximum sentence under Section 1202(a) would have been two years' imprisonment.

Nothing in the legislative history of these statutes warrants the court of appeals' decision not to apply the plain language of Section 924(a). Sections 922 and 1202 were enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. Law No. 90-351, 82 Stat. 230, 236. As the court of appeals recognized (App. A, *infra* 5a-6a), Section 1202 was added as a part of Title VII, a last-minute floor amendment to the bill that already included Section 922. The proponents of the amendment in each house stated that the amendment was designed to "complement" the provisions of Title IV (which included Section 922) and to "take nothing from" the latter. 114 Cong. Rec. 14774 (1968) (remarks of Senator Long); *id.* at 16286 (remarks of Congressman Machen). There is no suggestion in the legislative history that the provisions of the hastily added amendment were intended to override the more carefully drafted sections of the bill. See *Scarborough* v. *United States*, 431 U.S. 563, 569-570 (1977).

Moreover, the court of appeals' holding deprives the government of an important prosecutorial tool expressly provided by Congress. The difference between a maximum term of five years' and two years' imprisonment is significant, especially where the class of potential defendants consists, by definition, solely of convicted felons. In many cases, as here, for example, where respondent's prior conviction was for murder (App. A, *infra*, 2a n.1), the prosecutor will conclude that the possibility of more than a two year prison sentence is warranted. Depriving federal prosecutors of the opportunity to charge under a provision with a five-year maximum penalty, and prohibiting judges from imposing a sentence in excess of two years' imprisonment even though both Congress and the court believe a greater sentence to be appropriate, will severly hamper the enforcement of the federal gun control laws.

Indeed, the court's disregard for the congressional design in Section 922 leads to an incongruous result. Section 922(h) applies not only to persons already convicted, but also to persons under indictment for a crime punishable by imprisonment for a term exceeding one year. Since Section 1202(a) includes no parallel provision reaching persons under indictment,

under the court of appeals' reasoning such persons who receive a firearm that has moved in interstate commerce are subject to a maximum term of five years in prison under Section 922(h), even though a *convicted* felon who receives the same firearm is subject to no more than a two-year sentence for violating the same provision because of the overlap between Sections 922(h) and 1202(a).

2. The court of appeals plainly erred in disregarding the unambiguous language of Sections 922 (h) and 924(a) in order to avoid addressing a constitutional question.[2] As the Court recently reiterated in *Swain* v. *Pressley*, 430 U.S. 372, 378-379 n.11 (1977), "resort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or

[2] The court of appeals found some support for its interpretation in two other principles of statutory construction, the rule of lenity and the doctrine of implied repeal, although it acknowledged that neither could be applied here "without some difficulty" (App. A, *infra*, 7a-8a). Neither doctrine provides the slightest support for the court of appeals' decision. The rule of lenity applies only where a statutory provision is ambiguous, and not where the intent of Congress is clear (*Scarborough* v. *United States*, 431 U.S. 563, 577 (1977)), and the doctrine that a later-enacted statute may under certain circumstances repeal an earlier statute obviously has no application where, as here, both provisions in question were enacted as parts of the same statute, the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 230, 236. Both sections were subsequently reenacted, with minor amendment but without any modification of the penalty provisions, by Sections 102 and 301 of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1220, 1236.

when the statute provides a 'fair alternative' construction." But "[w]hen it is reasonably plain that Congress meant its Act to prohibit certain conduct," the courts may not distort that congressional purpose, "not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity." *Ibid.*, quoting *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948).

There is, as noted above, no ambiguity in the wording of Sections 922(h) or 924(a), and the court of appeals' construction of these provisions is not "fairly possible" on the basis of the statutory language. These provisions, like those at issue in *Swain* v. *Pressley*, *supra*, 430 U.S. at 378, are "sufficiently plain to require [the courts] simply to read [them] as [they] are written."

3. In any event, the constitutional concerns that troubled the court of appeals are insubstantial. Although the court suggested that Sections 922(h) and 1202(a) might be void for vagueness (App. A, *infra*, 9a), there is nothing vague about either provision. The notice that a criminal law must give to citizens relates to the standard of conduct that they are expected to follow, not to the exact punishment that will be imposed once they are found by a court to have violated that standard.

> A criminal statute must be sufficiently definite to give notice of the required *conduct* to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation.

Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337, 340 (1952) (emphasis added). Since the nature of the conduct proscribed by the gun control laws is sufficiently clear to give persons notice when their conduct may lead to criminal liability, there is no unfairness that could give rise to a due process objection.

Nor is there merit to the court of appeals' concern about the "due process and equal protection interest in avoiding prosecutorial discretion and obtaining equal justice" (App. A, *infra*, 9a-10a). It is well settled that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" in the absence of a showing of invidious discrimination. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). There is no suggestion here that the government chose to proceed against respondent under Section 922(h) rather than Section 1202(a) for any improper reason.

Finally, the court observed that Congress could not abandon its responsibility for establishing the appropriate punishment for criminal conduct by setting different maximum sentences for legally indistinguishable offenses (App. A, *infra*, 9a-15a). But despite the differences in penalty for violations of Sections 922(h) and 1202(a), the discretion exercised by prosecutors in determining which provision to use is no greater or different than the discretion they exercise daily in determining whether to charge a lesser or greater offense in cases where a defendant's conduct subjects him to prosecution for either offense.

4. The court's unprecedented interpretation of the federal gun control laws poses serious problems for the administration of criminal justice. Absent review by this Court, the decision will establish a different sentencing scheme for those convicted of violating Section 922(h) in the various circuits. It will also encourage the many persons previously convicted of violating Section 922(h) and sentenced to terms in excess of two years to file actions challenging the legality of those sentences. Moreover, it is questionable whether the impact of the court's decisions will be confined to cases involving Section 922(h). Other provisions of the gun control laws have a similar area of overlap, such as Sections 922(g) and 1202(a), both of which proscribe a felon's receipt of a gun that has travelled in interstate commerce. The court of appeals' decision thus casts doubt upon large numbers of sentences under such overlapping provisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

SIDNEY M. GLAZER
WILLIAM C. BROWN
Attorneys

NOVEMBER 1978

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 77-1819

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MILTON DEAN BATCHELDER, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Illinois, Northern Division

Crim. No. 77-10004—ROBERT D. MORGAN, *Judge*

Heard January 25, 1978—Decided July 24, 1978

Before CUMMINGS and BAUER, *Circuit Judges*, and MCMILLEN, *District Judge.**

CUMMINGS, *Circuit Judge.* In March 1977, defendant was indicted under 18 U.S.C. § 922(h) on the ground that he was a previously convicted felon who,

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* Judge Thomas R. McMillen of the Northern District of Illinois is sitting by designation.

on July 31, 1975, received a .38 caliber pistol which had previously been transported in interstate commerce. A jury found defendant guilty and he received a five-year sentence. Although defendant raises five issues in seeking a new trial, his most impressive point on appeal is that his constitutional rights were violated because he received a five-year sentence under 18 U.S.C. § 922(h) whereas the identical offense is proscribed by 18 U.S.C. App. § 1202 (a), which carries a lesser penalty.

The essential facts that gave rise to his indictment under Section 922 can be stated briefly. On July 22, 1975, Russell Koch, a Special Agent with the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, went in an undercover capacity to Carl's Bar in Bellevue, Illinois, accompanied by an informant. Defendant was tending bar inside. Although the testimony at trial differed on who instigated the conversation, there was no dispute that Koch discussed with defendant a purchase of one or two firearms which were in defendant's possession and that nine days later he sold Koch a .38 caliber revolver. The parties stipulated before trial that the revolver had been shipped in interstate commerce in 1948 and that the defendant in 1960 was convicted of a crime punishable by imprisonment for a term exceeding one year.[1] He was tried and convicted under Section 922

[1] As events during the proceedings below revealed, defendant had previously pled guilty to murder and had served approximately 13 years in prison.

(h), which prohibits convicted felons from receiving firearms that have traveled in interstate commerce.

I. *The Choice Between the 2-Year Sentence and the 5-Year Sentence*

Because Section 1202 was part of a "last minute" amendment that was "hastily passed, with little discussion, no hearings, and no report" (*United States* v. *Bass*, 404 U.S. 336, 344), it has posed several difficult problems of interpretation. See, *e.g.*, *United States* v. *Bass*, *supra*; *Stevens* v. *United States*, 440 F.2d 144 (6th Cir. 1971). The problem posed here is that both 18 U.S.C. § 1202(a) and 18 U.S.C. § 922 (h) prohibit one who has been convicted of a felony from receiving a firearm that previously traveled in interstate commerce but provide different penalties for that offense.

Section 922(h), reenacted as part of Title IV—State Firearms Control Assistance—of the Omnibus Crime Control and Safe Streets Act of 1968, provides:

> "It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to receive any firearm or ammunition which has been shipped or transported in interstate commerce."

Section 924(a) of the same statute provides for violations of Section 922 a maximum fine of $5,000 and

a maximum imprisonment term of five years; defendant received the five-year maximum sentence.

18 U.S.C. App. § 1202(a), passed for the first time as Title VII—Unlawful Possession or Receipt of Firearms—of the same Omnibus Act, provides:

> "Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

Defendant's argument is that two statutes that proscribe the same offense and require identical proof [2] cannot subject an offender to different penalties. Apparently this argument has two dimensions, one based on statutory interpretation and the other based on potential constitutional impediments. We consider each in turn and conclude that it is impermissible to sentence a defendant for five years under

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[2] While it is true that Section 1202 is not a word-for-word copy of Section 922, the Government did not argue that the two statutes had any different substantive elements, at least as applied to the receipt of a firearm by a convicted felon. See generally *United States* v. *Hariston*, 437 F.Supp. 33, 34 (N.D. Ill. 1977); *United States* v. *Panetta*, 436 F.Supp. 114, 129 n. 31 (E.D. Pa. 1977). While the dissent notes various differences between the two statutes, it does not suggest any difference as applied to a convicted felon who receives a firearm.

Section 922(h) when he could receive only a two-year maximum sentence under Section 1202(a).

A *Statutory Interpretation*

Section 922(h) had its origin in Section 2(f) of the Federal Firearms Act of 1938. 52 Stat. 1250, 1251. Section 5 of that statute made the penalty a $2,000 maximum fine or imprisonment for not more than five years, or both. 52 Stat. 1252. See 1968 U.S. Code Congressional and Administrative News 2205, 2207 (1968). The statute was included as part of the Act that eventually was passed under the title of the Omnibus Crime Control and Safe Streets Act of 1968.

Although Section 922(h) was a part of that Act from its introduction in the House in 1967 through June of 1968 when the Act passed both Houses and was signed into law, Section 1202 was, as the Supreme Court described, a product of a last-minute amendment. See generally *Stevens* v. *United States*, 440 F.2d 144 (6th Cir. 1971). After the Act had passed the House and had been reported to the Senate by the Senate Committee on the Judiciary, on the day the Senate version of the Act passed the Senate, Section 1202 was offered from the floor as an amendment by Senator Long. 114 Congressional Record 14775 (1968). No specific mention of Section 922 was made in the brief debate that followed, but one general reference to Title IV does appear. Senator Dodd asked whether Senator Long's amendment was a substitute for Title IV and Senator Long replied (*Id.* at 14774):

> "Mr. Long of Louisiana. This amendment would take nothing from the bill. I applaud what the committee did. This would add to the fine work the committee did in this area."

After the Act passed the Senate, the House reconsidered it in light of the Senate's changes before the bill, including both Sections 922(h) and 1202(a), was signed into law in June of 1968. In explaining Senator Long's amendment to the House, Congressman Machen said that "this provision is necessary to a coordinated attack on crime and also [is] a good complement to the gun control legislation contained in Title IV." *Id.* at 16286.

This brief legislative history leaves a perplexing problem of statutory construction. While it could be argued that the legislators' comments indicate that Congress intended the two titles to coexist, it is hard to imagine, and nothing in the history suggests, that the legislators if they were focusing upon these Sections could have considered Section 1202 a "good complement" to Section 922. Because we therefore find the legislative history inconclusive,[3] our deter-

[3] Ironically in light of its refusal to admit that Justice Black's dissenting opinion on a subject that the majority refused to reach can lend support to a doubt of constitutionality, the dissent here argues that Justice Blackmun's statement in dissent in *United States* v. *Bass*, 404 U.S. 336, 356, that the two Sections as interpreted were identical should have put Congress on notice to take some action. Particularly when based on a dissenting opinion, this argument is contrary to the accepted notion that Congress' inaction should be given little weight in construing a statute. See 2A *Sutherland's Statutory Construction* § 49.10. Even assuming that attention should be given to Congress' inaction, doing so here merely demonstrates why reliance on such inaction is inappropriate: since the language of the *Bass* dissent implies that the whole statutes are being treated as duplicates and since the *Bass* majority makes clear that criminal provisions are to be construed with lenity, a legislator might have thought that no action was necessary to avoid use of the 5-year penalty.

mination of what meaning to give to two inconsistent provisions in the same Act rests on the application of three general principles of statutory construction. First is the principle, recently reaffirmed in *United States* v. *Bass*, 404 U.S. 336, 347-349, and applied in a discussion of these same two titles of the hastily amended Omnibus Act, that ambiguity concerning the interpretation of criminal legislation should be resolved in favor of lenity.[4] While this principle usually is applied to the interpretation of individual statutes whose phrasing is ambiguous, it also seems helpful when as here two separate parts of the same Act arguably contradict each other and therefore leave the intent of the legislators ambiguous. See 2A *Sutherland's Statutory Construction* § 47.02.

To the extent that the individual sections of the Omnibus Act instead are regarded as separate enactments, a second principle of statutory construction comes into play: that a later-enacted statute can

[4] As Judge Crowley noted in *United States* v. *Hairston*, 437 F.Supp. 33, 36 (N.D. Ill. 1977), although this principle usually is applied in determining the scope of criminal statutes, it also has relevance to the determination of the penalty. Cf. *United States* v. *Evans*, 333 U.S. 483; *McBoyle* v. *United States*, 283 U.S. 25, 27; Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 Harv. L. Rev. 748, 751 (1935).

under certain circumstances serve as an implied repeal of an earlier statute. Applying this principle, it can be argued that Senator Long's amendment—Section 1202(a)—is Congress' last word on the issue of penalty because it was added to the bill after Section 922 and because it was first enacted in 1968 while Section 922 dates back 30 years earlier. While implied repeals are disfavored particularly in the absence of a manifest intent to repeal, the conflict between the two sections and the broad coverage of Section 1202 lend some support under these circumstances to the notion that the penalty in Section 1202 should predominate. See generally *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154.

Although these first two principles cannot be applied to these facts without some difficulty, the third and in this case most important principle seems to apply with full force. That principle is that when a "serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62. See *United States* ex rel. *Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408. Because, as outlined in the next part of this opinion, the constitutionality of inconsistent penalties is open to serious question, this third principle, together with whatever persuasive force can be drawn from the first two principles, leads us to construe the Omnibus Act as limiting imprisonment to a maximum of two years for the offense of receiving

a firearm by a convicted felon.[5] Accord, *United States* v. *Hairston*, 437 F.Supp. 33 (N.D. Ill. 1977).

B. *Constitutional Issues*

Justice Black's forceful dissenting opinion in *Berra* v. *United States*, 351 U.S. 131, joined by Justice Douglas, touches on several important constitutional protections implicated by a prosecutor's power to select one of two statutes that are identical except for their penalty provisions. Assuming that the protection against vague criminal legislation extends to the punishment provision (see *United States* v. *Hairston*, 437 F.Supp. 33, 35 (N.D. Ill. 1977), the statutes may be void for vagueness under the Fifth Amendment. As Justice Black suggested, "[a] basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered." 351 U.S. at 139. At least in the absence of published guidelines by the prosecutor (see *Hutcherson* v. *United States*, 345 F.2d 964, 971 (D.C. Cir. 1965) Bazelon, J., dissenting), certiorari denied, 382 U.S. 894, a second type of constitutional protection implicated is the due process and equal protection interest in avoiding excessive prosecutorial discretion

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[5] Because defendant was not fined, we need not decide how these arguments apply to the fact that Section 1202 allows a larger fine than Section 922. Cf. W. LaFave and A. Scott, *Criminal Law* 79 (1972).

and in obtaining equal justice. In Justice Black's words (351 U.S. at 140):

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same."

Tying these constitutional claims together are the basic concepts of separation of powers and delegation of authority. There is strong evidence that partially in order to avoid such vague penalties, excessive executive discretion and unequal justice, it is Congress' constitutional responsibility in defining a criminal offense to affix a scheme of punishment. See *United States* v. *Hudson*, 11 U.S. 32, 34; *Berra* v. *United States*, 351 U.S. 131, 139-140 (Black, J., dissenting); cf. *United States* v. *Evans*, 333 U.S. 483. Although, apart from Justice Black's opinion in *Berra* we have found no Supreme Court opinions explicitly dealing with this precise question, the Court has emphasized that the legislature cannot shift its task of fixing punishment either to the courts (*United States* v. *Evans*, 333 U.S. 483, 486; cf. *Giaccio* v. *Pennsylvania*, 382 U.S. 399)[6] or apparently to administrative agencies, particularly in the absence of guidance or a clear delegation. See *United States* v. *Grimaud*, 220 U.S. 506, 516; see generally W. LaFave & A. Scott, *Criminal Law* 103 (1972); L. Jaffe, *Judicial Control of Administrative Action* 110 (1965).[7] It is our con-

[6] The dissent's argument that it is "so easy for the sentencing judge to mitigate when the more punitive section is used" (*infra* at 23) necessarily depends on the unsupported contrary position that Congress' failure to establish one scheme of punishment can be excused by placing that burden on the courts. Compare *United States* v. *Evans*, 333 U.S. 483, 486. It is notable that in placing that burden on the sentencing judge, the dissent either assumes that the judge always will mitigate the 5-year sentence (in which case there is no need to dissent from our mitigation) or it assumes that the sentencing judge can do what the dissent does not—determine what Congress thought justifies resort to the more severe provision as opposed to selecting a punishment from a range of penalties in one statute. Further, as a practical matter, the dissent's total reliance on the sentencing judge assumes without support that all judges in selecting a sentence are completely unaffected by the statutory maximum and that no judge is inclined to select the maximum available penalty. By focusing on the effects of the sentencing choice from the perspective of the district judge, the dissent also ignores the reality that prosecutors' ability to use Section 922 at their whim gives them considerable leverage in the plea bargaining process, the results of which are not always likely to be corrected by even the most active sentencing judges. In short, the dissent's unquestioning reliance on the sentencing judge provides neither a sufficient theoretical basis for excusing Congress' failure nor a practical solution to the resulting problem; therefore it should not satisfy the serious doubts of the constitutionality of the statute.

[7] As Justice Black noted in *Berra*, even assuming that a statute allowing a judge or jury or even perhaps an administrative agency to select from a range of penalties can be analogized to the inconsistent penalty provisions here, a statute giving a prosecutor the power to choose between inconsistent penalties is significantly more offensive than the discretion involved in selecting from a range of penalties in one statute, because the judicial and administrative processes used in the latter selection are regulated by procedural protection and are more guided. 351 U.S. at 140. Cf. *Giaccio* v. *Pennsylvania*, 382 U.S. 399.

clusion that at best Congress would have no more power to delegate the selection of punishment to the Attorney General than it does to the courts or to administrative agencies.[8] Because this statutory scheme, if interpreted to give meaning both to Sections 922 and 1202, would affix two separate and inconsistent punishments rather than one scheme of punishment (compare *United States* v. *Evans*, 333 U.S. 483), we have serious doubts about the constitutionality of that construction. See *Berra* v. *United States*, 351 U.S. 131, 139-140 (Black, J., dissenting).

Consistent with the assertedly "settled rule" that the prosecutor can select which of two overlapping statutes to apply to a defendant (*United States* v. *Ruggerio*, 472 F.2d 599, 606 (2d Cir. 1973), certiorari denied, 412 U.S. 939), the Government's response to defendant's challenge is to cite several cases stating that a defendant has no constitutional complaint if he is charged under a statute like Section 922 instead of one like Section 1202. *E.g.*, *United States* v. *Mauney*, 454 F.2d 273 (6th Cir. 1972); *United States* v. *Fournier*, 483 F.2d 68 (5th Cir. 1973); *United States* v. *Phillips*, 522 F.2d 388 (8th Cir. 1975); *United States* v. *Panetta*, 436 F.Supp. 114, 129 n. 31 (E.D. Pa. 1977); *United States* v. *Raddatz*, No. 77 CR 325

[8] In fact, in different contexts the Supreme Court occasionally has indicated concern over the conduct of prosecutors who face non-existent or ill-defined statutory boundaries. Cf. *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98; *Bordenkircher* v. *Hayes*, 46 LW 4089, 4091.

(N.D. Ill. Feb. 6, 1978). Contra, *United States* v. *Hairston*, 437 F.Supp. 33 (N.D. Ill. 1977).

Our reading of the cases cited by defendant, as well as those have established the "settled rule" allowing prosecutorial choice, however, is that as applied to the choice between two statutes that have identical substantive elements they are either unpersuasive or inapplicable. Some of the opinions (*e.g.*, *United States* v. *Mauney*, *supra*; *Hutcherson* v. *United States*, 345 F.2d 964, 968 (D.C. Cir. 1965) (Burger, J., concurring), certiorari denied, 382 U.S. 894) offer only an assertion that the issue was decided by the majority in *Berra* v. *United States*, *supra*. While *Berra* refused to disturb the conviction in a case apparently involving two identical statutes[9] with different penalties, the defendant on appeal in *Berra* contended only that the jury should have been given a lesser-included offense instruction. Significantly, the Supreme Court majority expressly noted the question of the "validity of petitioner's conviction and sentence because of the assumed overlapping" but emphasized that "no such questions are presented here." 351 U.S. at 135. It was only Justice Black's dissent that reached the issue, and he argued that the Court should have decided the propriety of the sentence rather than, as the Court apparently had done, require that

[9] As Chief Justice Burger has noted, the fact that the two sections involved later were deemed not identical does not detract from the teaching of the case. *Hutcherson* v. *United States*, 345 F.2d 964, 969 n.2 (D.C. Cir. 1965) (Burger, J., concurring), certiorari denied, 382 U.S. 894.

the defendant raise the issue in a Section 2255 proceeding. 351 U.S. at 137 n. 4.

While the issue involved in this case thus was arguably present but not reached in *Berra* (except by the two Justices who would have vacated the sentence), in the other cases relied upon by the Government (*e.g.*, *United States* v. *Fournier*, *supra*), this issue was not present. Those cases either are or rely without explanation upon cases in which the two overlapping statutes at issue did not have the same elements or standards of proof.[10] This distinction, which was first suggested by the Court in *United States* v. *Beacon Brass*, 344 U.S. 43, 45, is significant

[10] This same distinction seems to appear in Justice Black's opinion in *Berra*. 351 U.S. at 138-139. In *Fournier*, for example, the court relied on *United States* v. *Chakmaikas*, 449 F.2d 315, 316 (5th Cir. 1971). In *Chakmaikas*, however, one of the two statutes involved required proof of a specific mental state (28 U.S.C. § 1001) while the other did not (42 U.S.C. § 408(c)). For similar cases articulating the "settled rule" of prosecutorial choice in the context of two statutes with different proofs, see *United States* v. *Di Varco*, 484 F.2d 670 (7th Cir. 1973), certiorari denied, 415 U.S. 916 (26 U.S.C. § 7206(1) and 18 U.S.C. § 1001); *United States* v. *Harris*, 558 F.2d 366 (7th Cir. 1977) (18 U.S.C. § 1001 and 18 U.S.C. § 1012); *United States* v. *Devitt*, 499 F.2d 135 (7th Cir. 1974), certiorari denied, 421 U.S. 975 (18 U.S.C. § 1621 and 18 U.S.C. § 1623); *United States* v. *Zouvras*, 497 F.2d 1115 (7th Cir. 1974) (18 U.S.C. § 876 and 18 U.S.C. § 1503 or § 1510). Leading cases of this type from other circuits are *Ehrlich* v. *United States*, 238 F.2d 481 (5th Cir. 1956) (18 U.S.C. § 1001 and 18 U.S.C. § 1012), and *United States* v. *Eisenmann*, 396 F.2d 565 (2d Cir. 1968) (18 U.S.C. § 1001 and 26 U.S.C. § 7214(a)(7)).

because overlapping statutes and the resulting delegation of discretionary authority are unavoidable and thus a necessity in dealing with the wide variety of acts that Congress makes criminal, but there is no necessity for such a delegation when two statutes prohibit exactly the same conduct.[11] Put another way, Congress cannot be said to have abandoned its responsibility to set a penalty when it sets different penalties in overlapping statutes because in doing so it has set a different penalty for each legally distinguishable offense, but it has abandoned that responsibility, when as here, different penalties are applied to statutes prohibiting identical acts. Cf. *United States* v. *Evans*, 333 U.S. 483; *United States*

[11] It is true, as the Supreme Court noted in *United States* v. *Bass*, 404 U.S. 336, 342, that the two statutes in restricting receipt do not include precisely the same set of persons and therefore are not completely identical. As applied to convicted felons, however, the Government did not contend that the definition of convicted felons in Section 922 differed from that in Section 1202. Therefore these statutes seem to violate the principle indicated to be fundamental in *Beacon Brass* and in Justice Black's *Berra* dissent because they prohibit identical conduct and allow unfettered choice in the selection of which of two penalties to apply. This case does not present the question, and we need not decide, whether Congress' statutory scheme would have been clearly valid if Section 922 were limited to those who had been convicted of more serious felonies. Further, although reading Section 922 to be limited in such a manner might be another reading that could save the constitutionality of the statutory scheme, unlike the reading proposed in the text, which draws at least some support from the notion that the two sections were meant to be complementary, we find no support whatever in the legislative history for applying Section 922 to a different class of felons.

v. *Petrillo*, 332 U.S. 1, 7-8; Note, 109 U.Pa.L.Rev. 67, 95 (1960). Because we therefore find the reasoning of other circuits cited by the Government to be inapplicable, we decline to follow those cases here[12] and are left with serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct.[13] Fortunately we need not reach a final conclusion on these difficult constitutional questions because, having found a possible ambiguity when the Omnibus Act is read as a whole, we can give the Act a clearly constitutional reading by requiring that defendant's sentencing be governed by Section 1202(a).

II. *Objections to the Underlying Conviction*

In seeking to have his conviction vacated as well as his sentence, defendant first argues that the indictment was fatally vague. Since the indictment itself referred to all the elements of the crime, described the firearm as "a .38 caliber pistol" and stated that

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[12] Apart from the Eighth Circuit's apparent reliance in *United States* v. *Phillips*, 522 F.2d 388, 393 (1975), on these inapplicable cases, it is also important to note that the defendant in *Phillips* was sentenced under the two-year provision and thus his standing to question any constitutional violation was doubtful. See *Hutcherson* v. *United States*, 345 F.2d 964, 968-969 (D.C. Cir. 1965) (Burger, J., concurring), certiorari denied, 382 U.S. 894.

[13] Because of the conflict of circuits suggested by the Government, this opinion has been circulated to the active members of this Court and no judge has requested a rehearing *en banc* with respect to this proposition.

it had been transported from Springfield, Massachusetts to St. Louis, Missouri, the contention that the indictment should have been dismissed is frivolous. See *United States* v. *Slatton*, 388 F.2d 676, 677 (5th Cir. 1968); *United States* v. *Lent*, 432 F.2d 440 (4th Cir. 1970); Federal Rule of Criminal Procedure 7(c)(1). As the defendant virtually admits in his brief (Br. 10), the Government's bill of particulars, which described the weapon in further detail and stated the date of the shipment in interstate commerce, was sufficient to advise the defendant of the evidentiary details of the offense, even if the indictment did not. See *United States* v. *Branan*, 457 F.2d 1062, 1063-1064 (6th Cir. 1972). Defendant's argument that the indictment was not sufficiently specific to provide double jeopardy protection is similarly meritless in light of the fact that the entire record of a trial can be used in adjudicating a double jeopardy claim. See *Russell* v. *United States*, 369 U.S. 749; *United States* v. *Henry*, 504 F.2d 1335 (10th Cir. 1974).

The defendant also assails the trial court's conduct at the voir dire on the ground that Judge Morgan should have inquired of prospective jurors whether they had previously served as jurors in criminal trials and whether defendant's prior felony conviction might prejudice them against him. We have recently held that it is within a trial court's discretion whether to ask the jurors about prior jury service. *United States* v. *Staszcuk*, 502 F.2d 875, 882 (7th Cir. 1975); 517 F.2d 53, 60 n.20 (7th Cir. 1975) (*en banc*), certiorari denied, 423 U.S. 837.

As to the district judge's failure to interrogate the jurors about defendant's prior felony, the voir dire shows that he first read the jurors the brief indictment which states that defendant had been "convicted on November 14, 1960, of a crime punishable by a prison term of one year." Shortly thereafter, without expressly mentioning defendant's prior felony, he asked the jurors seven questions with respect to their possible prejudice. Our reading of the transcript satisfies us that although asking at least some specific questions may be the better practice (see *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), certiorari denied, 410 U.S. 970), this use of a series of questions following reference to defendant's conviction cannot be termed an abuse of discretion. See *United States* v. *Rojas*, 537 F.2d 216, 219 (5th Cir. 1976), certiorari denied, 429 U.S. 1061; *United States* v. *Brewer*, 427 F.2d 409 (10th Cir. 1970); *United States* v. *Windsor*, 417 F.2d 1131 (4th Cir. 1969).[14]

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[14] Defendant's reliance on *United States* v. *Lewin*, 467 F.2d 1132 (7th Cir. 1972) and *United States* v. *Dellinger*, *supra*, is misplaced. In *Lewin*, the question refused by the district court inquired into the relationship of the potential jurors with the Better Government Association or the Chicago *Daily News*, the two sources that the Government planned to rely on almost exclusively in presenting its case. There was no indication that the jurors at the voir dire had any idea that either organization would be involved in the proof and therefore no claim was made that, as was the case here, in context the court's general inquiries could cover the subject matter of the refused questions. While the *Dellinger* opinion serves as an important reminder of the care and solicitude that district judges should give to voir dire, it offers no controlling principle to cover the unique factual context involved here.

Defendant next claims that the trial court erred in denying defendant's motion to strike the testimony of Special Agent Russell C. Koch of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, when he failed to produce the handwritten reports of his meetings with defendant. The district judge apparently credited testimony at the voir dire that the typewritten summary produced through regular procedures contained all the material that had been contained in the original handwritten notes, and the Assistant United States Attorney advised the court that after the notes were typed, they were discarded. Therefore, under this Circuit's decision in *United States* v. *Harris*, 542 F.2d 1283, 1292 (7th Cir. 1976), certiorari denied, 430 U.S. 934, defendant received all that was required under the Jencks Act.

As in *Harris*, we recognize that all the circuits are not in accord with that holding, at least as it applies to the notes of F.B.I. agents. Although the majority view appears to be the one stated in our *Harris* opinion (see *United States* v. *Martin*, 565 F.2d 362 (5th Cir. 1978); *United States* v. *Smaldone*, 544 F.2d 456 (10th Cir. 1976), certiorari denied, 430 U.S. 967; *United States* v. *Hurst*, 510 F.2d 1035, 1036 (6th Cir. 1976); *United States* v. *Mechanic*, 454 F.2d 849, 856 (8th Cir. 1971), certiorari denied, 406 U.S. 929; *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir. 1969), certiorari denied, 396 F.2d 837), the Ninth

and District of Columbia Circuits have indicated that destruction of an agent's handwritten notes might violate the Jencks Act. See *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Harrison*, 524 F.2d 421 (D.C. Cir. 1975). Even if we were to adopt the D.C. Circuit's approach prospectively, however, no sanctions would be appropriate based on the lack of showing of negligence or bad faith and the considerable evidence of guilt adduced at trial. *Id.* at 434. Although we therefore need not reach the Jencks Act question, apart from the interpretation of the statute we fail to understand why in the normal course these notes should not be retained so that, as Judge Sneed has written, "the question of whether an otherwise producible statement is useful for impeachment" can be left to the defendant instead of to the witness whom the defendant seeks to impeach. *United States* v. *Johnson*, 521 F.2d 1318 (9th Cir. 1975). Happily, we were advised at oral argument that agencies are adopting the practice of retaining the agents' handwritten notes.[15]

Defendant next urges that the district court did not properly handle alleged jury exposure to newspaper publicity about this case. After the jury had retired to deliberate, defense counsel called the court's attention to a Peoria newspaper article of that date stating that defendant had pleaded guilty to a mur-

[15] It is significant to note that defendant made no claim that the destroyed notes were *Brady* material. Compare *United States* v. *Harrison*, *supra*.

der charge in 1960 and had received a 25-year sentence. Pursuant to agreement with counsel, the district judge polled the jurors after they returned the guilty verdict, and all indicated they had not read or heard about that article.

After the verdict had been returned, two jurors told the trial judge that a third juror told them of a newspaper account of the case before jury deliberations had commenced. Consequently, the district judge conducted separate interviews with the jurors *in camera*. The juror who supposedly told other jurors about reading the newspaper article advised Judge Morgan that she had not read any accounts of the trial until the day after the verdict was returned, and each juror also stated that there had been no discussion by any juror during the deliberations about any news accounts as to defendant, and that none of them knew what crime had been the basis of defendant's previous felony conviction. It was the district court's function, not ours, to assess the jurors' credibility. Based thereon, he decided that no impropriety had occurred.[16] This satisfied the

[16] Although defendant asserts that the fact that the district judge assertedly told the two complaining jurors that the third juror, Mrs. Jones, would not serve on any further juries indicates that he believed that she had read the article, his denial of defendant's motion for a new trial proves the contrary. Assuming it was made, his statement to the two complaining jurors may have been an effort to satisfy them that some action would be taken or it may have been a reaction to the judge's belief that even though Mrs. Jones had not read the article during her jury service, she had told the other jurors that she had done so and on that basis was unfit for further service.

procedure outlined in *Margoles* v. *United States*, 407 F.2d 727, 735 (7th Cir. 1969), certiorari denied, 396 U.S. 833.

While Rule 43(a) of the Federal Rules of Criminal Procedure did not require that defendant or his counsel be present during these interviews because the verdict already had been returned, defendant argues that his counsel's presence should have been required in order to assure a vigorous inquiry. Because defendant did not show or apparently even seek a hearing to try to show prejudice, and in light of the overwhelming evidence of guilt, we agree with the Fifth Circuit that while inviting counsel would have been the better practice, the error was harmless. *United States* v. *Parker*, 549 F.2d 998, 1000 (5th Cir. 1977).

Finally, defendant submits that he was entrapped as a matter of law on the ground that the whole idea for the sale of the gun by defendant was implanted in his mind by informant Durine. Obviously, however, defendant was not entrapped into receiving the firearm, the crime with which he is charged, but rather was assertedly "entrapped" into selling the firearm, a crime with which he is not charged. It is worth noting that assuming the Government's involvement in the sale might provide a theoretical basis for quashing the evidence obtained by the sale and thus rendering the firearm inadmissible (cf. *Wong Sun* v. *United States*, 371 U.S. 471; *United States* v. *Hampton*, 425 U.S. 484, 493 (Powell, J., concurring)), that theory would be inapplicable here. As we read the record, the jury was presented with evidence that

defendant initiated the sale rather than the Government agent, was instructed by the judge on entrapment (apparently without objection), and therefore must have chosen to believe Special Agent Koch's version of the events.

The judgment below is vacated and the cause is remanded so that defendant may receive a maximum sentence of two years' imprisonment instead of the five years previously imposed.

McMILLEN, *District Judge*. I respectfully dissent from Section I of the above decision, and from the relief granted thereunder.

Batchelder was indicted and tried for the illegal receipt of a firearm under 18 U.S.C. § 922(h), *supra*, pp. 2-3. He was sentenced to five years imprisonment, as permitted by 18 U.S.C. § 924(a). Sections 922 and 924 are both part of Title IV of the Omnibus Crime Control Act of 1968. Title VII of that same Act contains another provision, codified as 18 U.S.C. App. § 1202(a). Besides defining substantive firearm offenses, it authorizes only two years imprisonment but permits a $10,000 fine, whereas § 924 permits five years custody and a fine of only $2,000. There are also differences between the offenses covered by § 922(h) and § 1202(a).

The principal difficulty posed by this case, in my opinion, is whether the co-existence of these two sections affords the prosecutor an impermissible choice

of remedies. I do not believe this discretionary choice violates any provision of the Constitution of the United States. Furthermore, the prosecutor's choice is not prejudicial to a defendant; the sentencing judge exercises the choice by ultimately choosing the penalty.

Contrary to the majority, I find persuasive and applicable the long line of cases, several from our circuit, which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants. *E.g.*, *United States* v. *Beacon Brass Co.*, 344 U.S. 43 (1952); *United States* v. *Harris*, 558 F.2d 366 (7th Cir. 1977); *United States* v. *Phillips*, 522 F.2d 388 (8th Cir. 1975); *United States* v. *Brown*, 482 F.2d 1359 (9th Cir. 1973) (per curiam); *United States* v. *Ruggiero*, 472 F.2d 599 (2d Cir. 1973), *cert. denied*, 412 U.S. 939 (1973); *Mauney* v. *United States*, 454 F.2d 273 (6th Cir. 1972) (per curiam); *Hutcherson* v. *United States*, 345 F.2d 964 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 894 (1965); *Ehrlich* v. *United States*, 238 F.2d 481 (5th Cir. 1956); *United States* v. *Raddatz*, 77 CR 325 (N.D. Ill. Feb. 6, 1978); *United States* v. *Panetta*, 436 F.Supp. 114, 129 n.31 (E.D. Pa. 1977). *Contra*, *United States* v. *Hairston*, 437 F.Supp. 33 (N.D. Ill. 1977). Although the rule is most often stated in terms of two statutes prohibiting the same act but requiring different elements of proof, I fail to see how the prosecutor's discretion is

any less when statutes also overlap on the question of punishment, if the defendant's behavior can render him subject to indictment under either section.

In fact, whether the statutes in question are identical, as stipulated by the parties (*see* majority opinion *supra* n.2), or merely overlap depends upon the perspective from which they are viewed. Title IV which contains § 922 and § 924, and Title VII which contains § 1202(a), provide distinct statutory schemes. Section 922, with thirteen subsections, places specific and severe limitations on importing, exporting, receiving, purchasing, or selling various types of firearms and ammunition. Only subsections (g) and (h) of § 922 coincide with the coverage of § 1202, and even then not completely. Subsections (g) and (h) of § 922 prohibit a fugitive from justice, as well as one "who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year," from transporting or receiving, respectively, any firearm or ammunition which has been shipped in interstate commerce. Section 1202(a) prohibits not only receipt and transportation of a firearm which has been in interstate commerce, *see United States* v. *Bass*, *supra*, but also possession of such firearm. It prohibits possession of firearms also by any person who received an other than honorable discharge from the Armed Forces, has renounced his United States citizenship, or is an alien illegally in the United States.

Four courts have specifically held that the coincidence of the two statutory provisions now before the court and the resulting prosecutorial discretion do not violate any constitutional guarantee. In *United States* v. *Phillips, supra,* 522 F.2d 388, 393 (8th Cir. 1975), the court relied on Congress' apparent intent for both provisions to stand together and held that the prosecutor was free to choose either § 1202 or § 922. *Accord, Mauney* v. *United States, supra,* 454 F.2d 273, 274 (6th Cir. 1972); *United States* v. *Raddatz, supra,* 77 CR 325 (N.D. Ill. Feb. 6, 1978); *United States* v. *Panetta, supra,* 436 F.Supp. 114, 129 n.31 (E.D. Pa. 1977).

The case at bar can be favorably compared with *Hutcherson* v. *United States, supra,* 345 F.2d 964 (D.C. Cir. 1965). Defendant had been indicted and convicted under a federal statute for an offense which was also prohibited under the D.C. Code. The court held at 345 F.2d 967:

> Hutcherson's next contention . . . is that the offenses denounced by the federal and local statutes are identical and that he was entitled to be prosecuted under the latter because the penalty for violating it is less severe than that provided by the federal statute. The theory is untenable. A defendant has no constitutional right to elect which of two applicable statutes shall be the basis of his indictment and prosecution. That choice is to be made by the United States Attorney. [footnote omitted].

In the case at bar, Judge Morgan was free to sentence Batchelder to two years or less—as prescribed

under § 1202—although he could and did sentence him to five years because Batchelder had been convicted of violating § 922(h). Rather than the prosecutor usurping the judge's role in sentencing, the majority of this panel would restrict the trial judge's discretion to enforce a federal statute. The only limitation which the prosecutor's choice of § 922 placed on the judge's sentencing is that the fine was limited to $2,000, whereas § 1202 would permit up to $10,000. Indeed, the logical extension of the majority opinion, notwithstanding its footnote 5, would be a judicial melding of §§ 924 and 1202, taking the two years imprisonment from § 1202 and the $2,000 fine from § 924(a). Such judicial legislative patchwork has been strongly disapproved by the Supreme Court. *See, e.g., United States* v. *Evans,* 333 U.S. 483 (1948).

The majority relies on three rules of construction in holding that Batchelder must be resentenced under § 1202(a). The first is that if there is ambiguity in an act of Congress, such ambiguity should be resolved in favor of lenity. It applies to the instant case only if the inclusion of two almost identical subsections of overlapping provisions in one enactment properly may be characterized as an ambiguity. The majority so finds, although it does acknowledge that on the floor of the Senate, Senator Long, who introduced § 1202 into the Act, and Congressman Machen in the House, characterized it as complementary to the scheme for gun control in Title IV (p. 4, *supra*).

The second principle noted by the majority holds that when Congress passes a statute virtually iden-

tical to one already on the books, a court can deem the new statute as implicitly repealing the old statute. However, both statutes in this case are part of the same Act; and although § 1202 was added by an amendment, the House-Senate conference did consider it at the same time as § 922 and as part of the same Act. Both sections were signed into law simultaneously.

The third principle relied on by the majority holds that where there is doubt as to the constitutionality of a statute, it should be construed to be constitutional. Pursuant to its citation of this principle, the majority suggests that such a statutory scheme may be void for vagueness.

Although the legislative history is less clear than it could be, I do not find any ambiguity in the presence of § 922(h) and § 1202(a) in the same statute. Each section is perfectly clear, and the inference is irrebuttable that the Congressional Conference Committee and the Congress read the entire bill, were aware of the two different penalties, and found it to express the intent of the majority.

There is additional evidence that Congress is unconcerned by the overlap between Titles IV and VII of the Omnibus Crime Control Act. In 1971, the Supreme Court held in *United States* v. *Bass*, 404 U.S. 336 (1971), that § 1202(a), like § 922(g), required proof that the weapon had passed through interstate commerce. Justice Blackmun, joined by Chief Justice Burger, dissented, stating, 404 U.S. at 356:

> The Court's construction of § 1202(a), limiting its application to interstate possession and receipt, shrinks the statute into something little more than a duplication of 18 U.S.C. §§ 922(g) and (h). I cannot ascribe to Congress such a gesture of nonaccomplishment.

Yet neither the majority nor the dissenters in *Bass* suggested that prosecution under one or the other of these identical statutes would violate any constitutional prohibition. Having been put on notice that the Supreme Court read § 1202(a) and §§ 922(g) and (h) as proscribing identical behavior, Congress in seven years has made no move to amend or repeal either section.

Unlike the majority here, we find *Berra* v. *United States*, 351 U.S. 131 (1956), (discussed at pp. 7ff., *supra*) more significant for the issues not addressed by its majority than for the reasoning in the dissent. The *Berra* court had before it two identical criminal statutes (see n.9 in majority opinion, *supra*), but the specific issue raised was whether the trial judge committed error when he refused to instruct the jury that it could find petitioner, who had been indicted under the statute carrying the greater maximum penalty, guilty under the statute carrying the lesser penalty, on the theory that the second statute described a lesser-included offense. The Court held that a separate, albeit identical, statute did not define a lesser-included offense merely because it prescribed a lesser punishment than the statute under which petitioner was indicted. In his dissent, Justice Black

urged that it was wrong to allow a prosecutor to determine the severity of the offense for which defendant would be tried. He implied that vesting such discretion in a prosecutor violated guarantees of due process, but he cited no authority for his opinion. He merely concluded, "Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command." 351 U.S. at 140 (Black, J., with Douglas, J., dissenting).

A dissenting opinion, even by a respected constitutional scholar such as the late Justice Black, is weak authority on which to hold a statutory scheme to be of "questionable constitutionality." That the Court did not reach the issue addressed in the dissent leads unavoidably to the inference that the other justices saw no significant constitutional question raised. *Accord, Hutcherson* v. *United States, supra,* 345 F.2d 964, 969 & n. 3 (D.C. Cir. 1965) (Burger, J., concurring).

In sum, I do not agree that the statutory scheme here under scrutiny is either ambiguous or unconstitutional. Congress explicitly afforded federal prosecutors two separate routes by which to prosecute persons who receive dangerous weapons. The violator knows the penalties he may be subjected to should he commit the offense; and, upon indictment, he is unambiguously apprised of the maximum fine and prison term by the appropriate statutory citation. The prosecutor's exercise of discretion in choosing whether to seek an indictment under § 922(h) or

§ 1202(a) is so limited, and so easy for the sentencing judge to mitigate when the more punitive section is used, that we see no opportunity for, nor is there before us an allegation of, abusive or arbitrary exercise of prosecutorial discretion. I would affirm.

A true Copy:

Teste:

/s/ Thomas F. Strubbe
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION BY JUDGE CUMMINGS
JUDGE MCMILLEN DISSENTING

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 24, 1978

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. THOMAS R. MCMILLEN, District Judge*

No. 77-1819

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MILTON DEAN BATCHELDER, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Illinois, Peoria Division

Crim. No. 77-10004—ROBERT D. MORGAN, *Judge*

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* JUDGE Thomas R. McMillen of the Northern District of Illinois is sitting by designation.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, Peoria Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED, and REMANDED, in accordance with the opinion of this court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 12, 1978

Before

HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. THOMAS R. MCMILLEN, District Judge*

No. 77-1819

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MILTON DEAN BATCHELDER, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Southern District of Illinois, Northern Division

Crim. No. 77-10004—ROBERT D. MORGAN, *Judge*

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-entitled cause by plaintiff-

---

* District Judge Thomas R. McMillen of the Northern District of Illinois is sitting by designation.

appellee, United States of America, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing *en banc* be, and the same is hereby, DENIED.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 276970 184

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-776

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

MILTON DEAN BATCHELDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1978
CERTIORARI GRANTED JANUARY 8, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-776

UNITED STATES OF AMERICA,

Petitioner,

—*v.*—

MILTON DEAN BATCHELDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

77 Cr. 10004

UNITED STATES OF AMERICA

v.

MILTON DEAN BATCHELDER

RELEVENT DOCKET ENTRIES

DATE	PROCEEDINGS
1977	
Mar. 16	Indictment, filed
Apr. 6	A.U.S. Atty. & Deft. w/c pres. in o/c. Deft. acknowledges receipt of copy of Indict. & waives having same read in o/c. Court advises Deft. of the consequences if found guilty. Deft. enters plea of Not Guilty & same is rec'd. & entered of record. Existing Bond to remain in full force & effect. *Jury Trial* set for *Thurs., June 16, 1977, at 10:00 A.M.* Ent. (Morgan, J)
April 25	Parties pres. w/c. Motion filed by Atty. Jones to withdraw as Deft's. atty. Motion allowed (See Order) Atty. Charles A. Bellows now enters his appearance for Deft. (See Same) Deft. granted 15 days from today to file any pre-trial motions. Ordered that the Bond herein is amended by extending the territorial restrictions to the State of Ill. (Morgan,J.)
May 9	Motion to Dismiss Indictment for Failure to Give the Deft. a Speedy Trial, and Motion to Dismiss Indictment for Vagueness and Insufficiency of Information, filed by Deft.
May 18	Set for hearing on motions Fri., May 27, 1977 at 10:00 A.M. Notice sent by Clerk (Morgan, J)

DATE	PROCEEDINGS
1977	
May 23	Response to Def. Motion to Dismiss Indict. for Vagueness & Insufficiency of Information and Memoranda in Support of Motion w/proof of Serv. filed by Government.
May 23	Response to Motion to Dismiss Indictment for failure to give the Def. a Speedy Trial and Memoranda of Law in Response to Motion w/proof of Serv. filed by Government.
May 27	Parties pres. in o/c w/c for hearing on pending motions. Amended motion to dismiss for failure to give Deft. a speedy trial filed. Motion to dismiss for vagueness is denied. Directed by the Court that the U.S. Atty. is to furnish Deft. w/ a Bill of Particulars with the maker and the number of the gun in question. Amended Motion to dismiss is also denied. (Morgan, J.)
June 8	Bill of Particulars, filed by pltf. w/prf. ser.
June 16	Mot. to Dismiss filed by Def.
June 16	Parties present by counsel in Ct. Chambers before trial for hearing on Mot. to Dismiss. Counsel for Def. waives presence of Def. Mot. denied (Morgan, J)
June 16	Parties present in o/c w/c. Case called for trial & each side announces readiness. Jury called, selected & sworn (12, no alternate). Opening statements made by counsel. Stipulation of parties read to the Jury by the Ct. & filed. (See same) Evidence presented on behalf of Gov't. Gov't rests. Mot. for Judg. of Acquittal filed at close of Gov't evidence by Def. Hearing. Mot. denied, Evidence presented on behalf of Def. Def. rests. Gov't does not present evidence on rebuttal. Mot. for Judg. of Acquittal at the close of all the evidence filed by Def. Hear. Motion Denied. Time for adjournment having arrived, Trial continued until 9:30 A.M. 6-17-77. (Morgan, J)

DATE	PROCEEDINGS
1977	
June 17	Parties present in o/c w/c. Jury also present & trial resumed w/closing arguments by/c. Jury instructed by the Ct. Two officers sworn to take charge of jury during its deliberations. Jury retires at 11:03 A.M. to consider verdict. Jury taken to Wright's Rest. for Lunch (See order). Jury returns into o/c at 1:48 P.M. w/verdict as follows: "We, the Jury, find the defendant Milton Dean Batchelder, guilty." Ct. inquires of jury about any outside influence on its deliberations. All jurors reply in the negative. Verdict received filed & entered of record. Jury polled at request of Def. & all jurors answer in the affirmative. Jury discharged from further consideration of case. On Mot. of Def. ordered that existing bond remain in full force & effect. Judg. of conviction on verdict entered. Matter referred to Prob. Office for presentence investigation & report. (Morgan, J)
June 21	Motion in Arrest of Judgment w/Affidavit of Mailing filed by Def.
June 24	Notice of Filing & Mot. for a New Trial w/Affidavit of mailing filed by Def.
June 30	Set for Hearing on Pending Motions, Tuesday, July 12, 1977, at 11:00 A.M. Notices sent by Clerk.
July 5	Memorandum in Support of Motion for a New trial, with notice of filing, by Deft., filed.
July 11	Amended Motion for A New Trial, by Deft., filed.
July 12	Set for hearing on motions and possible sentencing Mon., Aug. 1, 1977 at 11:00 A.M. Notice by Clerk. (Morgan, J)

DATE	PROCEEDINGS
1977	
Aug. 1	Parties pres. in o/c w/c for hearing on pending Motions. Transcript of in camera interview of jurors & news article made part of record. Motion in arrest of Judgment DENIED. Motion for New Trial DENIED. Allocution re. sentence by Counsel. It is ordered by the Court that Def. is committed to the custody of the Atty. Gen. for imprisonment for a period of Five years. Costs of $65 assessed. (See Judg. & Commitment Order) Def. advised of right to appeal. Motion to Continue bond pending appeal GRANTED. (Morgan, J) Certified copies of Judg. & Comm. Order distributed By Clerk.
Aug. 4	Notice of Filing of Notice of Appeal & Notice of Appeal filed by Def.
Aug. 8	Copy of Notice of Appeal, Docket Sheet & Cr. Info. sheet sent to Ct. of Appeals, Chicago, IL.
Aug. 31	CC of Order from Ct. of Appeals filed: Record due 10-10-77; Def. Brief 11-25-77; Pltf. Brief 12-30-77; Reply 1-13-78.
Sept. 22	Record forwarded to Ct. of Appeals, Chicago, IL.
1978	
July 27	Opinion from U.S. Court of Appeals, filed. Judgment vacated & cause remanded so deft. may receive a maximum sent. of 2 yrs. imprisonment instead of 5 yrs. previously imposed. (1 dissenting opinion affirmed)
Dec. 29	PETITION TO REVOKE BOND, filed by pltf. w/ cert. ser.
Dec. 29	MEMORANDA OF LAW, filed by pltf.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 77-1819

UNITED STATES OF AMERICA

v.

MILTON DEAN BATCHELDER

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/25/77	Filed 15c appellant's brief, svc.
12/13/77	Filed O&3c appellant's motion for leave to file a supplemental brief, svc.
12/15/77	Filed 15c per order appellant's supplemental brief, svc.
12/16/77	Entered order granting motion to file a supplemental brief and the clerk is to file instanter the 15c of appellant's brief; further ordered that the appellee's brief be filed by 1/13/78.
12/16/77	Entered order setting appeal for oral argument on Wed. 1/25/78 9:30 am. Oral argument limited to 15 min per/side.
1/16/78	Filed 15c appellee's brief, dist, svc.
1/24/78	Filed 15c reply brief, svc. dist.
1/25/78	Heard and taken under advisement.

DATE	PROCEEDINGS
2/13/78	Filed O&6c appellee's additional authority, dist, svc.
3/21/78	Filed O&6c appellee's additional authority, dist, svc.
7/24/78	Filed opinion by Judge Cummings. Judge McMillen, dissent.
7/24/78	Entered final judgment order VACATED AND REMANDED.
8/3/78	Filed O&3c appellee's motion for extension of time for petition for rehearing (in banc), svc.
8/9/78	Entered order that said motion is GRANTED, and the time for filing a petition for rehearing in banc is extended up to 8/22/78.
8/23/78	Filed 25c appellee's petition for rehearing in banc, dist, svc.
9/12/78	Entered order denying petition for rehearing in banc.
9/19/78	Filed O&3c motion of appellant, for a stay of mandate, svc.
9/25/78	Entered order that said motion is granted, and the mandate is STAYED up to 10/23/78, pending the filing the filing of the petition for writ of cert. to the Supreme Court of the U.S. by the appellee's.
10/6/78	Filed copy of letter to appellant extending time in which to file a petition for writ of cert. until 11/11/78.
10/26/78	Filed O&3c appellant's motion for a stay of mandate, affd., svc.
11/1/78	Entered order granting said motion, and the mandate of this court shall be stayed until 11/13/78 pending filing of cert.
11/16/78	Filed O&3c appellant's motion to stay mandate pending disposition of petition for writ of cert., affd., svc.

DATE	PROCEEDINGS
11/16/78	Filed notice of filing petition for cert. on 11/10/78; Supreme Court No. 78-776.
11/21/78	Entered order that said motion is denied. See note 13 of page 12 of this court's slip opinion dated 8/24/78.
11/27/78	Filed O&3c appellant's motion for reconsideration of denial of motion for stay of mandate, affd., svc.
11/30/78	Entered order that said motion is denied for reasons noted in 11/21/78 order of this court.
1/3/79	Entered order from Supreme Court staying the mandate pending disposition of petition for cet, in the event petition is denied, this order terminates automatically, if petition is granted, order remains in effect pending the sending down of the judgment; further ordered that request for continued admission to bail is DENIED.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Criminal No. 77-10004

VIO: Title 18, Section 922(h), United States Code.

UNITED STATES OF AMERICA

v.

MILTON DEAN BATCHELDER

Southern District of Illinois)
) ss
Northern Division)

INDICTMENT

The Grand Jury charges:

That on or about the 31st day of July, 1975, in the Southern District of Illinois, Northern Division, and within the jurisdiction of this Court,

MILTON DEAN BATCHELDER

having been convicted on November 14, 1960, of a crime punishable by imprisonment for a term exceeding one year, did knowingly receive a firearm, that is, a .38 caliber pistol which had been shipped and transported in interstate commerce from Springfield, Massachusetts, to St. Louis, Missouri, in violation of Title 18, United States Code, Section 922(h).

A True Bill.

/s/ Gerald D. Fines
GERALD D. FINES
United States Attorney

/s/ David Keil
Foreman

By:

/s/ Terry G. Harn
TERRY G. HARN
Assistant United States Attorney

IN THE DISTRICT COURT OF THE
UNITED STATES FOR
THE SOUTHERN DISTRICT OF ILLINOIS
NORTHERN DIVISION

Criminal Action

77-10004

UNITED STATES OF AMERICA

—*vs*—

MILTON DEAN BATCHELDER, DEFENDANT

Monday, August 1, 1977

11:00 o'clock a.m.

Peoria, Illinois

BEFORE:

HON. ROBERT D. MORGAN,
District Judge.

PRESENT:

TERRY G. HARN, ESQ.
Assistant U.S. Attorney
Post Office Building
Peoria, Illinois,
on behalf of the Government;

CHARLES A. BELLOWS, ESQ.
(Bellows & Bellows)
One IBM Plaza—Suite 1414
Chicago, Illinois 60611
on behalf of the Defendant.

[13] beyond the Constitutional bounds of federal jurisdiction, but I think they extend them as far as they could.

MR. BELLOWS: I can understand that Congress can say, "We don't want certain individuals to carry guns." No question about that. I think it's a good Act. But I think it overstepped the bounds. I mean the prosecution —not the Congress—when they indicted him on a charge on interstate shipment which took place back in '48 when we didn't have such a law—that Congress intended that we go indefinitely before the Act as enacted. I haven't found any cases. I have talked to federal lawyers myself to see what their thought was, because it's interesting to me.

THE COURT: I will say those are pretty scarce, sir.

MR. BELLOWS: Thank you for the compliment. Other than that, your Honor has been most fair and these are trial errors that take place. Your judgment as against the judgment of an adversary lawyer in the case, so I submitted what I thought all the questions involved in this case, your Honor.

THE COURT: Well, on the last point, I do disagree with you, sir. And I think the Supreme Court's recent decision that you refer to does sustain that [14] view, although there are distinguishing points on the facts. I agree with you. The other points, I am willing to ride with the decision made at the time of the trial. And I recognize fully your right to disagree and the possibility that you might be right. Motions, however, will be denied for the reasons stated. And is there any reason why sentence should not be pronounced at this time?

MR. BELLOWS: None, your Honor. I would like to say this: your Honor has been kind enough to have the probation report sent to me and Mr. Batchelder and I have gone over the report. I would like to say this about his previous conviction, your Honor. It was a brawl in a tavern. And by examination of the facts of the case and in discussion with Batchelder and his family, it was really at the most a manslaughter situation but anyway on advice of counsel he pleaded guilty and he served a

lot of time. Really spent a good part of his life in prison as a result of that brawl in the tavern.

In addition, there have been many arrests before that occurred. A great many of them appear to have been disturbances of the peace. And from what I gather they were in taverns or as a result [15] of drinking problem, which he dosen't have any more.

So you have a defendant who was once convicted and served a great deal of time. He came back on violation of parole without benefit of counsel. It was revoked and he served two more years. I think if he had a lawyer at the hearing before the parole board or at parole hearing that might have been a different story.

He has only this one conviction, your Honor, prior to this case and that is unfortunate situation where a man was killed. He is now married. He is a hard worker. He has been employed constantly. These are matters for your Honor's consideration. And his drinking problems have gone and vanished during the years —during the years he was in prison. He did a lot of time. He did about 13 years out of the 25 year sentence. So it's been a tough life. It has been unfortunate that so much of his life has been taken up as a prisoner.

I'm going to ask your Honor—I know this is a serious offense—having a pistol—man who has been previously convicted. I don't deny that it is serious. You take the whole picture of what took place in this case and I think there are mitigating circumstances in view of the fact that [16] there was defense—and your Honor did instruct the jury—there was a question here of entrapment. Maybe it wasn't sufficient, but there was that element that crept into the case. The Government's witness was not brought in. Perhaps, he was unavailable. Mr. Harn said he couldn't find him. Maybe he would have strengthened our case if he had been brought in.

So I ask your Honor in view of the total picture to take this into consideration for your Honor to mete out the minimum sentence your Honor deems advisable in this kind of case.

THE COURT: Will you step up here with your client, sir.

Mr. Batchelder, have you had an opportunity to go over the pre-sentence report with your attorney Mr. Bellows?

THE DEFENDANT: Yes, sir.

THE COURT: And, I take it, you are making your statement—just concluding your statement by way of allocution in mitigation of punishment. Mr. Bellows, is there anything further you wanted to say?

MR. BELLOWS: No, your Honor. I have covered everything. We have gone over every item in that report. Might [17] have been some discrepancy, but not enough really to affect your Honor's judgment in this case.

THE COURT: Is there anything further you would like to say, Mr. Batchelder, in mitigation of punishment or otherwise before the Court imposes sentence?

THE DEFENDANT: No, your Honor. I did not plead guilty, your Honor. And I have a family and have a lot of obligations to them and I work hard and try to do what's right. I didn't know I was committing any illegal acts and that's when this thing happened.

THE COURT: Sir, I have a great deal of difficulty in believing that. State weapons charge in 1976, which you paid a fine of $500. I take it, that was in connection with these same events?

THE DEFENDANT: Yes, your Honor.

THE COURT: I find it difficult to believe that you didn't know you weren't supposed to be selling guns, sir, and having guns.

THE DEFENDANT: I didn't necessarily sell that gun. I thought I was supposed to own a gun. That was never my gun at no time.

THE COURT: Well, as you well know, you had continual trouble with law enforcement people since you were nineteen years old. Now, I want you to know, sir, [18] that I do not enhance a sentence in this case by any of the some 20 relatively minor offenses which were listed by the probation officer where it is not clear that you did have legal counsel.

THE DEFENDANT: I did not understand.

THE COURT: There are several pages of offenses—some of which were dismissed and some of which fines were paid, which were relatively minor—

MR. BELLOWS: That's where he had a lawyer in these cases.

THE DEFENDANT: I told Mr. Simpson I did, but I can't remember who they were and what cases.

THE COURT: I'm ignoring some 20 offenses where the report doesn't make it clear that you did have counsel, but I do note a prior sentence in the county jail for rioting in 1952 as well as murder sentence which Mr. Bellows referred to. And also the state gun offense in 1976 where you also did have legal counsel, as well as the parole violation in 1972. I don't know whether you had counsel or not. You did serve your time for that. And I don't enhance the sentence in any way on that account.

Now, I simply cannot justify a fine or a short sentence in this case, because—as the jury [19] found and as the Court is fully satisfied—you are guilty, sir. And I just do not believe that you didn't know better. Now, I want you to know that. You may think I should take your word on that, but I'm unable to do so.

It will be the sentence of the Court that you be remanded to the custody of the Attorney General for a term of five years.

Now, I want you to know—I'm sure your attorney has or will advise you—of your right to take appeal from the conviction in this case. However, it's my duty under the Federal Rules of Criminal Procedure to advise you that you do have a right to appeal by filing a notice of appeal in the office of the Clerk within ten days of today.

If for any reason you can't afford to pay for an appeal and counsel on appeal in this case you can apply to appeal in Forma Pauperis by making an affidavit that the Clerk will give you on request. If there is any reason your attorney does not file a notice for you the Clerk upon request will file a notice of appeal within ten days of today. After ten days from today the right

of appeal will be lost. And that's the reason I specifically advise you in that regard.

[20] An appeal is filed—of course, transcript must be ordered and appeal must be prosecuted with dispatch under the Rules of Court of Appeals and Federal Rules of Appellate Procedure for appeal or the appeal might suffer dismissal for failure to comply with the rules.

The costs will be assessed against the defendant as well.

MR. BELLOWS: Your Honor, I've talked to Mr. Batchelder and he intends to appeal this case. He lives with his wife and child and has a home subject to a mortgage and he is employed. Could he remain at large on the same bond pending filing a notice of appeal, your Honor?

MR. HARN: May I be heard on that. The Government would very strongly object to the defendant remaining on bond pending any appeal. I think inconvenience suffered by the defendant by reason of the denial of bond would be short. The appeal would be dealt with in swift fashion.

The pre-sentence report reveals quite a lengthy record. I would point out to the Court that we are not dealing with a simple possession situation. The Defendant's apparent lack of concern for the law I think should be considered by [21] the Court.

THE COURT: There are certain other factors in pre-sentence report. I have read the pre-sentence report. Is there anything further, other than that, that you wish to refer to?

MR. BELLOWS: There are times that a Court can justify a refusal for bail pending appeal where the defendant is a danger to the community. And he is not a danger to the community. He has been here at all times. Whenever the case came up he was present. He has a family that he lives with. He isn't somebody who would disappear tomorrow.

He knows very well that if he didn't show up or fail in his bond requirements he could be subject to another indictment with a penalty up to five years. I wouldn't be requesting, your Honor, bail if I thought he would be committing another offense. As a member

of the bar I owe that much responsibility to the community and the Court that I wouldn't make that representation or request if I thought he was a danger. And I sincerely believe that he is not.

I see no reason why he couldn't remain until we filed our motion for notice of appeal and notice of appeal, which we expect to do today or tomorrow, [22] your Honor, as soon as we get back to the office. And as I say, he isn't any danger and he has a substantial bond up now in the sum of $10,000.

THE COURT: $10,000 cash?

MR. BELLOWS: Well, it's ten per cent of the $10,000, your Honor.

MR. HARN: Your Honor, I would indicate that in light of the Defendant's apparent financial condition that small bond in this case, being $1,000, is certainly not enough to assure his appearance at any subsequent time. I think at this time the verdict of the jury have been sustained, post-trial motions denied, the Defendant is no longer cloaked in the presumption of innocence which is held to him throughout the trial. Risk of the Defendant leaving the jurisdiction is greater now than has been at any prior time.

MR. BELLOWS: I don't think that statement is justified.

THE COURT: Well, 38(a)(2) I think is applicable. Rule 38(a)(2) I think is applicable and provides a sentence of imprisonment shall be stayed if appeal is taken and Defendant is released pending disposition of the appeal pursuant to Rule 9(b) of Federal Rules of Appellate Procedure. I was looking for the Rule which I think still makes [23] reference to danger to the community that you referred to.

MR. HARN: Your Honor, are you referring to Section 3148, Title 18?

THE COURT: Possibly. Yes, well, that essentially says that after appeal the same provision of the Bail Reform Act shall apply unless there appears to be some substantial danger that didn't exist before. Isn't that—except the word "substantial" I don't think is found there. "If a risk of flight or danger appears to exist

. . . they should be treated in accordance with provisions of Section 3146 unless the Court or Judge has reason to believe that no one or more conditions of release will reasonably assure the person will not flee or pose a danger to any other person or to the community."

Now, I don't think there is any proper showing of a danger to any other person or to the community, except possibly the offenses of the type that this Defendant has had a penchant mostly, as Mr. Bellows points out, in years sometime ago. At least as far as convictions are concerned. I'm going to permit the release of the Defendant on existing bond pending filing of notice of appeal [24] and during the pendency of any appeal.

You understand, do you, Mr. Batchelder, that any failure to appear here or in the Court of Appeals . . . to the extent that might be required . . . could result in forfeiture of your bond and forfeiture of the cash deposit and judgment against you for the balance of the bond. And that, perhaps, even more important than that, it could result in further Federal charges against you for an offense known as "bail jumping;" do you understand that?

THE DEFENDANT: I understand that, your Honor.

MR. BELLOWS: May I file a written notice of appeal right now or can I send it in from the office?

THE COURT: You can file it later. I have released him pending the filing of an appeal.

MR. BELLOWS: Thank you very much. Your Honor, may I see the transcript, too?

THE COURT: Yes.

MR. BELLOWS: And I want to compliment the probation department in the pre-sentence report they did.

THE COURT: We think they're good.

Anything further?

MR. HARN: Nothing further, your Honor.

MR. BELLOWS: Thank you.

(Hearing Concluded.)

SUPREME COURT OF THE UNITED STATES

No. 78-776

UNITED STATES, PETITIONER,

v.

MILTON DEAN BATCHELDER

ORDER ALLOWING CERTIORARI—Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285669 296

No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Petitioner,

vs.

MILTON DEAN BATCHELDER,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES A. BELLOWS
JASON E. BELLOWS
CAROLE K. BELLOWS
One IBM Plaza, Suite 1414
Chicago, IL 60611
312/467-1750
Attorneys for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60616 (312) 525-6581

In the
Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA,

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MILTON DEAN BATCHELDER,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Government's Petition for Writ of Certiorari is completely without merit as appears from a reading of the well reasoned opinion of the United States Court of Appeals for the Seventh Circuit. Each of the Government's contentions is answered in such fashion that we deem a formal brief on the question unnecessary. We would only like to point out certain pertinent passages from the opinion of the Court of Appeals.

For example, the question of the various cases of other courts of appeals which are seemingly in conflict with the

opinion here we need quote only the following which appears at page 13a of the Appendix to the Petition for Certiorari:

> Our reading of the cases cited by defendant, as well as those have established the "settled rule" allowing prosecutorial choice, however, is that as applied to the choice between two statutes that have identical substantive elements they are either unpersuasive or inapplicable. Some of the opinions (e.g. *United States* v. *Mauney*, supra; *Hutcherson* v. *United States*, 345 F.2d 964, 968 (D.C. Cir. 1965) (Burger, J., concurring), certiorari denied, 382 U.S. 894) offer only an assertion that the issue was decided by the majority in *Berra* v. *United States*, supra. While *Berra* refused to disturb the conviction in a case apparently involving two identical statutes with different penalties, the defendant on appeal in *Berra* contended only that the jury should have been given a lesser-included offense instruction. Significantly, the Supreme Court majority expressly noted the question of the "validity of petitioner's conviction and sentence because of the assumed overlapping" but emphasized that "no such questions are presented here." 351 U.S. at 135. It was only Justice Black's dissent that reached the issue, and he argued that the Court should have decided the propriety of the sentence rather than, as the Court apparently had done, require that the defendant raise the issue in a Section 2255 proceeding. 351 U.S. at 137 n. 4.
>
> While the issue involved in this case thus was arguably present but not reached in *Berra* (except by the two Justices who would have vacated the sentence), in the other cases relied upon by the Government (e.g., *United States* v. *Fournier*, supra), this issue was not present. Those cases either are or rely without explanation upon cases in which the two overlapping statutes at issue did not have the same elements of proof.

As to the question of the discretion granted to prosecutors to choose between various penal statutes, we believe the Court of Appeals most adequately answered the Government's position thusly: (Appendix to Petition for Certiorari, pages 10a-12a.)

> There is strong evidence that partially in order to avoid such vague penalties, excessive executive discretion and unequal justice, it is Congress' constitutional responsibility in defining a criminal offense to affix a scheme of punishment. See *United States* v. *Hudson*, 11 U.S. 32, 34; *Berra* v. *United States*, 351 U.S. 131, 139-140 (Black, J., dissenting); cf. *United States* v. *Evans*, 333 U.S. 483. Although, apart from Justice Black's opinion in *Berra* we have found no Supreme Court opinions explicitly dealing with this precise question, the Court has emphasized that the legislature cannot shift its task of fixing punishment either to the courts (*United States* v. *Evans*, 333 U.S. 483, 486; cf. *Giaccio* v. *Pennsylvania*, 382 U.S. 399) or apparently to administrative agencies, particularly in the absence of guidance or a clear delegation. See *United States* v. *Grimaud*, 220 U.S. 506, 516; see generally W. LaFave & A. Scott, *Criminal Law* 103 (1972); L. Jaffe, *Judicial Control of Administrative Action* 110 (1965). It is our conclusion that at best Congress would have no more power to delegate the selection of punishment to the Attorney General than it does to the courts or to administrative agencies. Because this statutory scheme, if interpreted to give meaning both to Section 922 and 1202, would affix two separate and inconsistent punishments rather than one scheme of punishment (compare *United States* v. *Evans*, 333 U.S. 483), we have serious doubts about the constitutionality of that construction. See *Berra* v. *United States*, 351 U.S. 131, 139-140 (Black, J. dissenting).

Lastly, we wish to call the court's attention to the analysis of the Court of Appeals of the inconsistency of the two provisions of the same Act under consideration. The Court of Appeals enunciated three principles, (1) the principle Lenity; (2) the principle that a later enacted statute can under certain circumstances serve as an implied repeal of

an earlier statute; and (3) that when a serious doubt of constitutionality is raised a court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The Court of Appeals adopted the third principle and, while it was confirmed about the constitutionality of the enactment involved it adopted a construction which avoided the constitutional issue.

We suggest that if there is any reason for granting certiorari in this case it would be to determine whether the Court of Appeals was correct in avoiding the constitutional issue.

For the above and foregoing reasons we respectfully submit that the Petition for Certiorari ought to be denied.

CHARLES A. BELLOWS
JASON E. BELLOWS
CAROLE K. BELLOWS

Attorneys for Respondent

No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

MILTON DEAN BATCHELDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ANDREW J. LEVANDER
Assistant to the Solicitor General

SIDNEY GLAZER
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 581 F.2d 626.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on July 24, 1978. A petition for rehearing was denied on September 12, 1978 (Pet. App. 34a-35a). On Oetober 2, 1978, Mr. Justice

Stevens extended the time for filing a petition for a writ of certiorari to and including November 11, 1978. The petition for a writ of certiorari was filed on November 10, 1978, and was granted on January 8, 1979 (A. 17). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the prison sentence imposed on a defendant convicted under 18 U.S.C. 922(h), which carries a maximum five-year term, must be limited to two years if his conduct also violated 18 U.S.C. App. 1202(a), which carries only a two-year term.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. 18 U.S.C. 921(a) provides in pertinent part:

> As used in this chapter—
>
> * * * * *
>
> (14) The term "indictment" includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.
>
> (15) The term "fugitive from justice" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.
>
> * * * * *
>
> (20) The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

3. 18 U.S.C. 922(h) provides:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924(a) provides:

> Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

5. 18 U.S.C. App. 1202(a) provides:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more two years, or both.

6. 18 U.S.C. App. 1202(c) provides in pertinent part:

> (2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, respondent, who had previously been convicted of a felony, was convicted of unlawfully receiving a firearm that had been transported in interstate commerce, in violation of 18 U.S.C. 922(h). Pursuant to 18 U.S.C. 924(a), he received a sentence of five years' imprisonment. The court of appeals affirmed respondent's conviction, but, by a divided vote, the panel vacated the district court's judgment and remanded the case for resentencing, concluding that the maximum allowable sentence in this case was two years' imprisonment (Pet. App. 1a-31a).[1]

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[1] By order of the Chief Justice, the mandate of the court of appeals has been stayed pending resolution of this case by the Court. *United States* v. *Batchelder*, No. A-561 (Dec. 29, 1978).

1. The evidence at trial showed that on July 22, 1975, Russell Koch, an undercover agent of the Bureau of Alcohol, Tobacco and Firearms, accompanied an informant to Carl's Bar in Belleview, Illinois, where respondent was employed (Tr. 58-59). Agent Koch overheard respondent, who had been convicted of a felony in 1960,[2] tell someone in the bar that he had a firearm that the government didn't know about (Tr. 60). Two days later, Koch and the informant returned to the bar, at which time respondent showed them a .38 caliber revolver that he was wearing in a waist holster. Respondent offered to loan the revolver to them for a particular "job" and said they would have to pay him $110 if they had to discard the gun (Tr. 61-64). One week later Koch returned to the bar and purchased the revolver from respondent for $70 (Tr. 64-65). During the course of this transaction respondent told Koch "that the gun had come from a burglary in St. Louis" (Tr. 65). Respondent stipulated that the revolver had been shipped from Massachusetts to Missouri in 1948 (Tr. 57).[3]

2. On appeal the court affirmed respondent's conviction, but a divided panel reversed and remanded for resentencing to a maximum term of two years'

[2] Respondent had pleaded guilty to murder in 1960 and thereafter had served approximately 13 years of a 25-year sentence. At trial, respondent stipulated that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year (Tr. 57).

[3] Respondent admitted receiving the firearm; his defense at trial was that he had been entrapped by the government's informant (Tr. 117-123).

imprisonment. The majority opinion acknowledged that respondent had been indicted and convicted under 18 U.S.C. 922(h) and that 18 U.S.C. 924(a) clearly provides that such an offense is subject to a maximum penalty of five years' imprisonment, or a fine of $5,000, or both. The majority observed, however, that the substantive elements of Section 922(h) —at least as applied to a convicted felon who unlawfully receives a firearm—are identical to those of 18 U.S.C. App. 1202(a), which provides for a maximum sentence of only two years' imprisonment (Pet. App. 4a & n.2). The court concluded that, in these circumstances, it was "impermissible to sentence a defendant to five years under Section 922(h) when he could receive only a two-year maximum sentence under Section 1202(a)" (*id.* at 4a-5a).

In deciding that respondent could receive only the two-year maximum sentence provided by Section 1202(a) rather than the five-year maximum found in Section 924(a), the court relied upon three general principles of statutory construction. First, because in its view the different penalty provisions found in Sections 924(a) and 1202(a) "arguably contradict each other and therefore leave the intent of the legislators ambiguous," the court applied the doctrine of lenity, resolving the ambiguity in favor of the criminal defendant (Pet. App. 7a). Second, the court indicated that insofar as Section 1202(a) could be considered to represent "Congress' last word on the issue of penalty," it constituted an implied repeal of

Section 924(a) (Pet. App. 7a-8a). Finally, recognizing that "these first two principles cannot be applied to these facts without some difficulty," the majority relied on the maxim that if fairly possible a court should interpret a statute to avoid substantial constitutional issues (Pet. App. 8a-9a). Because the court found that "two statutes that are identical except for their penalty provisions" might violate notions of due process and equal protection (Pet. App. 9a-16a), it construed Sections 922(h) and 1202(a) "as limiting imprisonment to a maximum of two years for the offense of receiving a firearm by a convicted felon" (Pet. App. 8a-9a).

Judge McMillen dissented from the vacation of respondent's sentence, finding persuasive "the long line of cases * * * which hold that where an act may violate more than one criminal statute, the government may elect to prosecute under either, even if the defendant risks the harsher penalty, so long as the prosecutor does not discriminate against any class of defendants" (Pet. App. 24a). Judge McMillen conceded that this rule "is most often stated in terms of two statutes prohibiting the same act but requiring different elements of proof," but he could see no argument that "the prosecutor's discretion is any less when statutes also overlap on the question of punishment, if the defendant's behavior can render him subject to indictment under either section" (*id.* at 24a-25a).

SUMMARY OF ARGUMENT

Respondent, who had previously been convicted of a felony, was indicted and convicted on a charge of unlawfully receiving a firearm in violation of 18 U.S.C. 922(h). He was sentenced to five years' imprisonment, the maximum term provided by 18 U.S.C. 924(a). It is not here disputed either that respondent's conduct violated Section 922(h) or that Section 924(a) by its express terms constitutes the penalty provision applicable to violations of Section 922(h). Nonetheless, because respondent's conduct also violated 18 U.S.C. App. 1202(a), which carries a maximum term of two years' imprisonment, the court of appeals concluded that, as a matter of statutory construction, respondent could not be sentenced to more than two years' imprisonment. That conclusion is erroneous.

I.

Sections 922(h) and 924(a) were enacted together in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, as part of a comprehensive federal scheme of firearm control. In particular, Section 922(h) prohibits several categories of individuals, including convicted felons, from receiving firearms. And Section 924(a) provides without exception that violations of Section 922(h) and the other provisions of Title IV are punishable by up to five years' imprisonment, or $5,000 in fines, or both.

Nothing in the language or structure of Section 1202(a) suggests that its two-year maximum penalty

overrides the express terms of Section 924(a). Rather, Section 1202(a) is an independent and self-contained federal gun control statute that both delineates criminal conduct and provides for its punishment without reference to Title IV. The conduct prohibited by Section 1202(a) overlaps somewhat with the activities barred by Section 922(h), but the two statutes are far from coextensive. Section 922(h) and Section 1202(a) each covers categories of persons and reaches kinds of conduct not addressed by the other. In addition, Section 1202(a) contains a less rigorous interstate commerce element than Section 922(h). These differences in statutory scope emphasize the independent operation of the two statutes.

The pertinent legislative history confirms that Congress intended Section 924(a) and not Section 1202(a) to govern sentencing for violations charged under Title IV. Section 1202(a), which was enacted simultaneously with Title IV, is the core provision of Title VII of the Omnibus Act. Because Title VII was added as a last-minute amendment to the Omnibus Act, the original legislative reports make no mention of its content. However, Senator Long, the sponsor of Title VII, specifically stated that Section 1202 was to "take nothing from" but rather "add to" Title IV. 114 Cong. Rec. 14774 (1968). Moreover, the same Congress that enacted the Omnibus Act also thereafter amended Titles IV (including Section 924(a)) and VII in the Gun Control Act of 1968. The legislative reports accompanying these amendments clearly reflect Congress' understanding that

the substantive and penalty provisions of the two statutes were independent of one another. See, *e.g.*, H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31, 34 (1968).

Since Section 924(a) unambiguously controls the appropriate range of punishment applicable to the offense of which respondent was convicted, there is no occasion to apply the principle of lenity. Indeed, the decision of the court below creates anomalous results and defeats the obvious intention of the legislature. Nor is the decision of the court of appeals justified as a means of avoiding serious constitutional issues. The overlapping coverage of Sections 922(h) and 1202(a) does not raise substantial constitutional questions, and in any event the court's rewriting of the federal gun laws is not a "fairly possible" construction of Sections 924(a) and 1202(a). See *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977). Furthermore, since Sections 1202(a) and 924(a) were simultaneously enacted and subsequently re-enacted, neither could be held to have effected an implied repeal of the other.

II.

The court of appeals suggested that overlapping criminal provisions that carry different penalties may be unconstitutional. However, it is by no means uncommon or even undesirable for criminal statutes to overlap, and there is no basis in law for concluding that an overlap such as that presented here constitutes a denial of due process.

A. Title IV is not void for vagueness. On the contrary, Section 922(h) defines with clarity those persons who are prohibited from receiving firearms. Indeed, respondent essentially contends that the federal gun laws are too specific insofar as he clearly violated two separate statutes. Concomitantly, Section 924(a) unambiguously sets forth the applicable punishment. Neither the court of appeals nor respondent has identified what words or phrases in Title IV are vague or ambiguous, and such a specific criminal statute cannot be rendered void for vagueness merely because it overlaps with another unambiguous and independent criminal provision.

B. The prosecutorial discretion incident to the existence of overlapping criminal provisions does not in and of itself violate constitutional norms. Based on the doctrine of separation of powers and the practical difficulties inherent in judicial review of prosecutorial decisions, this Court has repeatedly stated that the prosecutor's decision to file charges and to proceed under one statute rather than another is not generally subject to judicial review. Just as the prosecutor has acknowledged discretion to decide such matters as whether or not to charge at all, whether to charge a greater or a lesser offense, or whether to charge one or more of a group of related offenses, so too the prosecutor may constitutionally elect to charge either of two overlapping or even identical criminal statutes. Indeed, the only constitutional limitation on the exercise of the prosecutor's discretion with regard to charging matters is that

his decisions not be motivated by invidiously discriminatory factors such as race or religion.

C. Finally, there is no merit to the related suggestion that the overlap between Sections 922(h) and 1202(a) somehow amounts to an unconstitutional delegation of Congress' duty to affix punishment to criminal statutes. Titles IV and VII contain precise penalty provisions that do not leave the courts to guess at the range of punishment deemed appropriate by Congress. To the contrary, it is the decision below that infringes both upon Congress' power to affix punishment to federal criminal laws and upon the Executive's broad discretion to enforce those statutes.

ARGUMENT

This case focuses on the interaction between Titles IV and VII of the Omnibus Crime Control and Safe Streets Act of 1968 ("Omnibus Act"), Pub. L. No. 90-351, 82 Stat. 225-235, 236-237, as modified by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-1236. Although the coverage of these statutes overlaps to some extent, each Title prohibits differing categories of potentially dangerous people from obtaining firearms, and each Title contains a specific penalty provision that by its unambiguous terms controls sentencing questions arising under that particular Title. Compare 18 U.S.C. 924(a) with 18 U.S.C. App. 1202(a). Indeed, the language, structure and legislative history of these statutes all point unequivocally to the conclusion that Titles IV and VII are self-contained statutory schemes that

Congress intended to be enforced independently of each other. Nonetheless, the court below held, as a matter of statutory construction, that where, as here, a defendant's conduct violates both Titles, he may be sentenced only in accordance with the lesser two-year maximum penalty found in Title VII, regardless of the statute under which he was prosecuted.

In point I of this brief, we show that this conclusion constitutes an unwarranted rewriting of the federal gun laws in direct conflict with Congress' manifest intent. In point II, we address the constitutional concerns, chimerical in our view, that appear to have prompted the court of appeals' strained construction of the statutes.

I. THE FEDERAL GUN CONTROL LAWS UNAMBIGUOUSLY AUTHORIZE THE IMPOSITION OF A SENTENCE OF UP TO FIVE YEARS' IMPRISONMENT FOR A VIOLATION OF SECTION 922(h)

It is beyond cavil that the language of Section 924(a) explicitly and unambiguously permits the sentence of five years' imprisonment that was imposed upon petitioner for his receipt of a firearm in violation of Section 922(h). Few indeed are the circumstances in which a court may appropriately refuse to uphold a statutory directive as plain and concise as that construed out of existence by the court of appeals in this case. See *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, No. 77-1465 (Feb. 20, 1979), slip op. 7, 17. Perhaps such judicial reconstruction of an unambiguous stat-

ute would be warranted when application of the statute as written would produce absurd results or when the statutory directive is flatly contradictory to some other portion of the same or of another statute. Such a result may also be justified if clear evidence of legislative intent demonstrated that the seemingly unambiguous statutory command was a mistake. Here, however, the plain language of Section 924(a) is in fact reinforced by an analysis of the structure and history of the pertinent provisions of the federal gun control laws. In such circumstances, neither the principle of lenity nor the distant specter of possible constitutional issues entitles the courts to construe the statutes at issue in a manner plainly at odds with their terms and purposes.

A. The Language And Structure Of The Federal Gun Control Laws Make Clear That A Violation Of Section 922(h) Is Punishable In Accordance With Section 924(a) And Not Section 1202(a)

1. Title IV represents a comprehensive scheme of federal firearm regulation and registration that seeks "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); see *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977); *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974); S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968); S. Rep. No. 1097,

90th Cong., 2d Sess. 28 (1968).[4] In particular, Title IV focuses upon four distinct categories of "potentially irresponsible and dangerous" people: (1) persons, such as respondent, who are under indictment for, or who have been convicted of, "a crime punishable by imprisonment for a term exceeding one year";[5] (2) fugitives from justice;[6] (3) addicts and unlawful users of various controlled substances;[7] and (4) the mentally incompetent.[8] Thus, Section 922(d) prohibits licensed gun dealers from knowingly selling, or otherwise disposing of firearms to any person in the four enumerated categories. Simi-

[4] At the core of Title IV is a licensing scheme. Each person engaged in the business of importing, manufacturing, transporting, selling, or otherwise dealing with firearms must procure a federal license. 18 U.S.C. 923, 922(a)-922(c). Federal licensees must keep detailed records of all their transactions, including special forms that must be filled out by every person buying or acquiring a firearm. See *Huddleston* v. *United States, supra,* 415 U.S. at 816; see also 18 U.S.C. 922(b)(5), 922(c), 922(m), and 923(g).

[5] 18 U.S.C. 922(d)(1), 922(g)(1), and 922(h)(1). The phrase "a crime punishable by imprisonment for a term exceeding one year" is further defined to exclude certain antitrust and business crimes, and crimes not involving firearms if classified by a state as a misdemeanor and punishable by no more than two years' imprisonment. 18 U.S.C. 921(a)(20). See 27 C.F.R. 178.11.

[6] 18 U.S.C. 922(d)(2), 922(g)(2), and 922(h)(2).

[7] 18 U.S.C. 922(d)(3), 922(g)(3), and 922(h)(3).

[8] 18 U.S.C. 922(d)(4), 922(g)(4), and 922(h)(4). In addition to the four groups of potentially dangerous persons described above, Section 922(b)(1) precludes licensees from selling handguns to persons under 21 years of age and any firearm to persons under 18 years of age. (It is not unlawful, however, for such underaged persons to receive firearms).

larly, Sections 922(g) and 922(h) bar persons falling within the four categories from transporting or receiving any firearm, respectively.[9]

Besides detailing with clarity the types of persons prohibited from receiving firearms, Title IV also unambiguously and expressly sets forth the appropriate range of punishment applicable to those convicted of violating Section 922(h) (as well as 922(d) and 922(g)). Section 924(a) provides that "[w]hoever violates any provision of this chapter * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both * * *." No exception appears on the face of Section 924(a), and the language and legislative history of Title IV make clear beyond peradventure that Section 922(h) is part of the "chapter" plainly subject to the penalty provisions of Section 924(a). See 82 Stat. 226, 234; S. Rep. No. 1097, 90th Cong., 2d Sess. 20-25 117 (1968). Accord, *United States* v. *Wright*, 581 F.2d 704 (8th Cir. 1978), cert. denied, No. 78-

[9] These provisions differ slightly with regard to their interstate commerce element. Section 922(g) prohibits transportation of firearms in commerce, whereas Section 922(h) proscribes receipt of a firearm that has at some time traveled in interstate commerce—a substantially less rigorous prerequisite to prosecution. See *Barrett* v. *United States, supra;* see also *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974) (construing "in commerce" language of the Clayton and Robinson-Patman Acts). Here, for example, respondent stipulated that the pistol in issue had been manufactured in Massachusetts and shipped to Missouri in 1948 (Tr. 57). (In addition, the evidence indicated that respondent had actually received the pistol following a burglary in St. Louis (Tr. 65).)

5429 (Jan. 15, 1979); *United States* v. *Musgrove*, 581 F.2d 406 (4th Cir. 1978); *United States* v. *Thrasher*, 569 F.2d 894 (5th Cir. 1978); *United States* v. *Phillips*, 522 F.2d 388, 393 (8th Cir. 1975); *United States* v. *Fournier*, 483 F.2d 68 (5th Cir. 1973); *Mauney* v. *United States*, 454 F.2d 273 (6th Cir. 1972); *United States* v. *Panetta*, 436 F. Supp. 114, 129 n.31 (E.D. Pa. 1977).[10] See also *Barrett* v. *United States*, *supra*, 423 U.S. at 215 (three-year sentence for violation of 18 U.S.C. 922(h)); *United States* v. *Carr*, 584 F.2d 612, 614 (2d Cir. 1978), cert. denied, No. 78-984 (Feb. 26, 1979) (same).

2. Although the court of appeals recognized that respondent had been prosecuted under Section 922(h) and that Section 924(a) "provides [the punishment] for violations of Section 922" (Pet. App. 3a), it nevertheless concluded that the maximum penalty provided in Section 1202(a) overrides the plain terms of Section 924(a). We submit that this ruling is not supportable. Certainly there is nothing in the language or structure of Section 1202(a) that suggests that its two-year maximum penalty provision is applicable to any criminal prosecution other than one brought under Section 1202.[11] Con-

[10] The Third Circuit has also apparently rejected the position taken by the court below. See *United States* v. *Goodroe*, No. 76-2252 (3d Cir. Feb. 28, 1977) (unpublished order; disposition of case reported at 549 F.2d 797), cert. denied, 434 U.S. 1062 (1978).

[11] The court of appeals declined to decide whether the maximum $5,000 fine in Section 924(a) or the maximum $10,000 fine in Section 1202(a) governed the sentences of defendants whose conduct violates both provisions.

spicuously absent in that provision is an express cross-reference to Sections 922 and 924. Indeed, insofar as Section 1202(a) states both the conduct prohibited and the potential punishment accorded the crime, it appears to constitute a self-contained gun control provision unconnected to, and independent from, Title IV. See Note, *Prior Convictions and the Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 327 (1976). The conclusion that Congress purposefully enacted two separate gun control provisions, each fully enforceable on its own terms, is further buttressed by the substantial differences in coverage between the two statutes.

a. Section 1202(a) proscribes the receipt, possession, or transportation of firearms by five categories of presumptively dangerous people: convicted felons (subsection (1)); persons dishonorably discharged from the Armed Forces (subsection (2)); mental incompetents (subsection (3)); persons who have renounced their American citizenship (subsection (4)); and illegal aliens (subsection (5)). Section 1202(a) thus imposes a disability on three groups (dishonorable dischargees, ex-citizens, and illegal aliens) that are not subject to Section 922(h); conversely Section 922(h) alone prohibits the receipt of firearms by fugitives from justice and by drug addicts and users.

Moreover, even the subsections of the two statutes that overlap are far from co-extensive. Section 922(h)(1) includes those currently under indictment for a felony as well as those who have been convicted,

but excludes from its coverage certain white collar crimes. See 18 U.S.C. 922(h)(1), 921(a)(20). In contrast, Section 1202(a) neither covers indictees nor exempts antitrust violators and the like.[12] Similarly distinguishable are the respective provisions concerning the mentally defective.[13] In short, "although subsections of the two Titles do address their prohibitions to some of the same people, each statute also reaches substantial groups of people not reached by the other." *United States* v. *Bass*, 404 U.S. 336, 342 (1971) (footnote omitted).

b. Furthermore, the range of activities proscribed by the two statutes is also not coterminous. Section 922(h) forbids the receipt of firearms and ammunition. Section 1202(a), on the other hand, deals only with firearms and not ammunition, but it prohibits possession and transportation as well as receipt.[14] The latter two elements differ substantially

[12] Other differences may exist. For example, Section 922(h) refers to a felony indictment or conviction in any court (*i.e.*, including those of foreign countries) whereas Section 1202(a) is limited to felony convictions obtained in federal or state courts.

[13] Section 922(h)(4) places a disability on anyone "who has been adjudicated as a mental defective or who has been committed to any mental institution." Section 1202(a)(3) merely applies to anyone who "has been adjudged by a court * * * of being mentally incompetent * * *." Commitment does not necessarily entail a court adjudication of mental incompetence. See, *e.g.*, H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 30 (1968).

[14] To some extent, this difference is offset by Section 922(g), which prohibits transportation. However, that provision appears to require proof of transportation "in commerce." See

from receipt. For example, suppose an individual received a weapon in 1971, was convicted of a felony in 1972, and continued to possess the weapon in 1973. He would not have violated Section 922(h), because at the time of the receipt he was not suffering from any disability. He would, however, have violated Section 1202(a) by possessing a firearm following a felony conviction. See also *Scarborough* v. *United States*, *supra*, 431 U.S. at 564-566, 576 n.13; *id.* at 579 (Stewart, J., dissenting); *United States* v. *Robbins*, 579 F.2d 1151, 1154 (9th Cir. 1978); *United States* v. *Powers*, 572 F.2d 146, 151 n.5 (8th Cir. 1978); *United States* v. *McDaniel*, 550 F.2d 214, 219 (5th Cir. 1977); *United States* v. *Jones*, 533 F.2d 1387, 1391 (6th Cir. 1976), cert. denied, 431 U.S. 964 (1977).

Each provision also contains a slightly different interstate commerce element. In order to prove a violation of Section 922(h), the government must establish that the firearm in question at some time had moved in interstate commerce. *Barrett* v. *United States*, *supra*; see note 9, *supra*. Such proof will also satisfy Section 1202(a). *Scarborough* v. *United States*, *supra*. However, insofar as the latter statute requires only that the illegal activity "affect[] commerce," the receipt, possession, or transportation of a firearm that has never crossed state lines may still constitute a violation of Section 1202(a).

note 9, *supra*. See also 18 U.S.C. 922(e), 922(f) (prohibiting common carriers from knowingly transporting weapons in violation of Title IV).

See 431 U.S. at 571-572. Thus, a felon's receipt and subsequent use of an intrastate weapon to rob an interstate shipment of goods would probably be punishable under Section 1202(a) but not Section 922 (h). Cf. *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976).[18]

c. While the court of appeals may have thought it anomalous that Congress would enact two overlapping criminal statutes with different penalty provisions, it is the result reached in this case that creates serious anomalies. For example, if a person received a firearm while under indictment for murder, he would be subject to up to five years' imprisonment. If he received the gun one day later, when he had been convicted of the murder, the maximum penalty would be reduced to two years. Similarly a felon's receipt of a single bullet could lead to a five-year sentence while receipt of the firearm itself would be punishable by a maximum of two years' imprisonment. And a person who had

[18] As this Court recognized in *United States* v. *Bass*, *supra*, 404 U.S. at 345-346, Congress may well have intended that Section 1202(a) reach all possessions, receipts, and transportations of firearms by convicted felons and others without regard to proof of an effect on interstate commerce in individual cases. Because the language of Section 1202(a) was considered ambiguous on this point, the Court required that the government prove a minimal nexus with commerce in every case. Compare *Perez* v. *United States*, 402 U.S. 146 (1971). In short, the *Bass* decision rendered the difference between the commerce elements of Sections 922(h) and 1202(a) narrower than Congress perhaps intended, thereby increasing the overlap between the two statutes to some degree.

been adjudicated a mental incompetent would be subject only to the lesser sentence, whereas the person who had merely been temporarily committed to a mental institution sometime in the past could receive the greater sentence. Finally, we note that this decision would also undermine Congress' intent (as manifested in Section 924(a)) to punish equally persons prohibited from receiving firearms and the gun dealers that knowingly supply such persons. Compare 18 U.S.C. 922(d) with Section 922(h).

B. The Legislative History Demonstrates That Congress Intended That Title VII Complement And Not Override The Express Provisions Of Title IV

In view of the language and structure of the statutes under discussion, the decision of the court of appeals can be upheld only by clear evidence that the court's construction carries out the unequivocally demonstrated aims of Congress in enacting the legislation. In fact, however, the pertinent legislative history strongly confirms that Congress intended Section 924(a) and not Section 1202(a) to govern the range of punishment applicable to violations of Section 922(h).

As previously indicated, Sections 922 and 924 were enacted together as part of Title IV of the Omnibus Act. Section 1202(a) was simultaneously enacted as a separate part of the Omnibus Act (Title VII). Because Title VII was added as a last-minute floor amendment to the Omnibus Act, it is not discussed in the legislative reports. See *Scarborough* v. *United States*, *supra*, 431 U.S. at 569-570 & n.9; *United*

States v. *Bass*, *supra*, 404 U.S. at 344 & n.11. Nonetheless, the legislative debates in both houses clearly reflect Congress' understanding of the interrelationship of the two Titles. Senator Long, the sponsor of Title VII, stated that Section 1202(a) would "take nothing from" but rather "add to" Title IV. 114 Cong. Rec. 14774 (1968). See also *id.* at 16286 (remarks of Rep. Machen) ("Title VII * * * [is] a good complement to the gun-control legislation contained in title IV of this bill"). In light of these statements, this Court has previously recognized that "[t]he purpose of [Title VII] was to complement Title IV." *Scarborough* v. *United States*, *supra*, 431 U.S. at 573.

Four months after enacting the Omnibus Act, the same Congress considered and passed the Gun Control Act of 1968. This statute amended and reenacted both Title IV and Title VII, as well as the National Firearms Act (26 U.S.C. 5801 *et seq.*). The Gun Control Act and its accompanying reports treat the provisions of Titles IV and VII as independent and self-contained,[16] with no indication of congressional awareness that the penalty provisions of Section 1202(a) preempted to any extent any portion of Title IV. See Pub. L. No. 90-618, 82 Stat. 1213-1236; S. Rep. No. 1501, 90th Cong., 2d Sess. (1968).

[16] Title I of the Gun Control Act amended Title IV of the Omnibus Act, Title II amended the National Firearms Act, and Title III amended Title VII of the Omnibus Act.

In fact, Congress considered including a provision in the Gun Control Act that would have doubled the penalties provided by Section 924(a) to a maximum of ten years' imprisonment and a $10,000 fine (see S. Rep. No. 1501, *supra*, at 21, 37), although this provision was ultimately rejected in conference. H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31 (1968).[17] Again the legislative history makes no reference to any impact of Section 1202(a) on the penalties that could be imposed under Section 924(a)—surely a most extraordinary omission if the court of appeals' ruling in this case were a correct reflection of congressional intent.[18]

C. The Doctrines Of Lenity, Implied Repeal, And Avoidance Of Constitutional Questions Do Not Justify The Court Of Appeals' Reconstruction Of The Federal Gun Laws

Notwithstanding the clarity of congressional design evidenced by the language, structure, and legislative history of Titles IV and VII, the court of appeals concluded that Section 1202(a) overrides Section 924(a) with regard to the penalty that may be imposed on defendants whose conduct violates both

[17] Congress did, however, amend the parole eligibility requirement found in Section 924(a). See Section 102 of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1224; H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 31 (1968).

[18] Subsequent legislative history is generally less persuasive than contemporaneous reports and debates. But here, the same Congress passed both the Gun Control Act and the Omnibus Act, and the same House and Senate Committees issued the relevant reports.

titles. The court justified this interpretation of the federal gun laws by reference to three maxims of statutory construction. First, the court invoked the principle "that ambiguity concerning the interpretation of criminal legislation should be resolved in favor of lenity" (Pet. App. 7a). Second, the court indicated that insofar as Title VII came after Title IV, it effected an implied partial repeal of Section 924(a) (*id.* at 7a-8a). Finally, acknowledging that "these first two principles cannot be applied to these facts without some difficulty" (*id.* at 8a), the court primarily relied on the doctrine that the courts will adopt a reasonable construction of a statute if that interpretation avoids a serious constitutional question. However, none of these three canons of statutory construction justifies the result in this case.

1. On a number of occasions this Court has stated and applied the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 14 (1978); *United States* v. *Bass*, *supra*, 404 U.S. at 347; *Bell* v. *United States*, 349 U.S. 81, 83 (1955). "This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." *Huddleston* v. *United States*, *supra*, 415 U.S. at 831. It is equally well-established, however, that the touchstone of the doctrine of lenity is the existence of a "grievous

ambiguity or uncertainty in the language and structure of the [criminal statute in question]." *Ibid;* see, *e.g.*, *Scarborough* v. *United States*, *supra*, 431 U.S. at 577; *Barrett* v. *United States*, *supra*, 423 U.S. at 217-218; *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820). No such ambiguity exists here.

Respondent unquestionably violated Section 922(h),[19] and Section 924(a) unambiguously specifies the punishment that may be imposed for that violation: "Whoever violates any provision of this chapter [*i.e.*, Section 922] * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both * * *." Section 1202(a), on the other hand, is the core provision of an independent, albeit complementary, federal gun control statute, that was designed to "take nothing from" but rather "add to" Title IV. 114 Cong. Rec. 14774 (1968) (remarks of Sen. Long). See *Scarborough* v. *United States*, *supra*, 431 U.S. at 573. As we have shown above, the language, structure, and legislative history of the Omnibus and Gun Control Acts unequivocally manifest congressional intent to punish violators of Section 922(h) by up to five years' imprisonment. And where there is no ambiguity, "there is no justification for indulging in uneasy statutory construction." *Barrett* v. *United States*, *supra*, 423 U.S. at 217. As this Court has often stated, "[e]ven penal laws * * * ought not to be construed so strictly as to defeat the obvious

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[19] Respondent does not contend that Section 922(h) fails to give adequate notice of the conduct prohibited.

intention of the legislature." *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829); see, *e.g.*, *Huddleston* v. *United States*, *supra*, 415 U.S. at 831; *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955); *United States* v. *Morris*, 39 U.S. (14 Pet.) 464, 475 (1840); *United States* v. *Wiltberger*, *supra*.

2. Similarly inappropriate is the court of appeals' primary reliance on the principle that statutes should be construed to avoid serious constitutional questions. In point II, *infra*, we contend that respondent's constitutional claims concerning overlapping criminal statutes with differing penalties are insubstantial, in which case there would be no colorable basis for applying the avoidance principle. See *Huddleston* v. *United States*, *supra*, 415 U.S. at 833. Moreover, even if the constitutional concerns were substantial, the court of appeals could not properly avoid addressing them by rewriting the plain terms of the federal gun laws. "[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977); see *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). For obvious reasons, the court of appeals failed to explain how the word "five" in Section 924(a) is ambiguous or how it could fairly be con-

strued to mean "two." In fact, the language, structure and legislative history of Titles IV and VII, described in detail above, "leave[] no reasonable alternative." *United States* v. *Five Gambling Devices*, 346 U.S. 441, 448 (1953). Accordingly, just as in *Swain* v. *Pressley*, *supra*, the principle that an ambiguous statute should be construed to avoid constitutional issues has no proper application here.

3. The court of appeals also suggested (Pet. App. 7a-8a) that Section 1202(a) had effected an implied repeal of Section 924(a). That assertion does not withstand close analysis. At the outset we note the cardinal rule that repeals by implication are disfavored. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974); *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Commission*, 393 U.S. 186, 193 (1968). The legislative intent to repeal must be clearly manifest in the " 'positive repugnancy between the provisior of the new law, and those of the old.' " *United States* v. *Borden Co.*, 308 U.S. 188, 199 (1939). See, *e.g.*, *Rosenberg* v. *United States*, 346 U.S. 273, 294-295 (1953) (Clark, J., concurring); *United States* v. *Gilliland*, 312 U.S. 86, 95 (1941); *Posadas* v. *National City Bank*, 296 U.S. 497, 503-504 (1936). There is, however, no repugnancy between Titles IV and VII. Rather, as is evident from the legislative history and the differing coverage of the two Titles described above, Sections 922(h) and 1202(a) not only coexist, but actually complement one another.

See also *Scarborough* v. *United States*, *supra*, 431 U.S. at 573. In such circumstances, "it is the duty of the courts * * * to regard each [statute] as effective." *Morton* v. *Mancari*, *supra*, 417 U.S. at 551. Accord, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, *supra*, 426 U.S. at 155; *Edwards* v. *United States*, 312 U.S. 473, 484 (1941); *United States* v. *Gilliland*, *supra*.[20]

Moreover, it is not readily apparent how one of two simultaneously enacted provisions could impliedly repeal the other.[21] Recognizing this difficulty, the court of appeals pointed out that Section 922(h) was derived in part from the Federal Firearms Act, ch. 850, 52 Stat. 1250, and that Title VII was added as an amendment to the bill that originally contained Title IV. But surely the doctrine of implied repeal depends upon one statute being *enacted* after another and not on the source or time of drafting. See *United States* v. *Borden Co.*, *supra*; *Posadas* v. *National City Bank*, *supra*; cf. *United States* v. *Moore*, 423 U.S. 122, 132-133 (1975).[22]

[20] We further note that the presumption against implied repeals is particularly strong in the case of criminal statutes. See Note, *The Rosenberg Case: Some Reflections on Federal Criminal Law*, 54 Colum. L. Rev. 219, 251 (1954).

[21] As previously stated, Sections 922, 924 and 1202 were enacted at the same time as the Omnibus Act.

[22] Moreover, Congress specifically reconsidered the five-year maximum penalty provided by Section 924(a) and subsequently reenacted that section with slight modification in the Gun Control Act of 1968. See page 25, *supra*. This reenactment wholly defeats any argument that Congress intended to or did partially repeal Section 924(a) by implication.

II. OVERLAPPING CRIMINAL STATUTES WITH DIFFERENT PENALTY PROVISIONS DO NOT DENY DEFENDANTS DUE PROCESS OF LAW

The court of appeals held that the sentencing provisions of Section 1202(a) supplant the express terms of Section 924(a) for offenses that violate both Title IV and Title VII of the Omnibus Act. In deciding this statutory question, the court stated that it had "serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct" (Pet. App. 16a). Specifically, the court suggested (1) that the statutes might be void for vagueness (Pet. App. 9a), (2) that the existence of two such similar statutes with dissimilar sentencing provisions would implicate "the due process and equal protection interest in avoiding excessive prosecutorial discretion" (*ibid.*), and (3) that such a statutory overlap raised separation of powers and delegation of authority problems (*id.* at 10a-16a). As we now show, the statutory overlap here is not unconstitutional for any of these reasons; indeed, we think it is fair to characterize these concerns as insubstantial.

A. Title IV Is Not Void For Vagueness

There is no merit to the contention that Title IV, analyzed either as a separate statute or as an independent component of the federal gun laws, is unconstitutionally vague. Viewed by itself, Title IV is a clear and specific criminal statute. Section 922(h) sets forth with precision the categories of individuals who are prohibited from receiving firearms that have

traveled in interstate commerce. For example, Section 922(h)(1) clearly forbade respondent, who had previously been convicted of murder, from receiving the pistol in question. Concomitantly, Section 924(a) provides the exact range of punishment deemed by Congress to be appropriate for violations of Section 922(h)—here, five years' imprisonment. Neither respondent nor the court of appeals has suggested any word or phrase in these criminal provisions that is elusive or ambiguous. See *Colautti* v. *Franklin*, No. 77-891 (Jan. 9, 1979), slip op. 11-17. In short, Title IV "give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); see *Colautti* v. *Franklin*, *supra*, slip op. 11; *United States v. Powell*, 423 U.S. 87, 92-94 (1975).

Nor is a valid criminal statute rendered void merely because it covers in part the same conduct proscribed by a different statute carrying a lesser penalty. Criminal statutes commonly overlap, and such overlaps are to some extent desirable. For instance, such overlaps help assure that culpable individuals will be less able to evade prosecution by planning their activities to fall between gaps that might otherwise be created by provisions without any overlap. Moreover, overlaps in coverages are in part an inevitable result of the limitations of language, as well as being a product of the attempt of the criminal law to punish similarly situated people alike while simultaneously meeting out individualized justice to different gradations and types of crime. See Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. Cal. L. Rev. 12, 20 (1972).

In any event, regardless of whether overlapping coverages are desirable, the fact that a person's conduct violates several criminal statutes cannot possibly lessen the notice afforded by particular statutes. If a statute is void for vagueness simply because identical proof of particular conduct would violate more than one statute, the federal and state criminal codes would be riddled with void provisions.[23]

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[23] For example, proof that a person submitted a false statement to the Department of Housing and Urban Development would establish a violation of both 18 U.S.C. 1001 and 18 U.S.C. 1010. The former statute carries a five-year maximum penalty, the latter only two years. Section 1001 similarly overlaps with numerous other provisions carrying different penalties. See, *e.g.*, 18 U.S.C. 287, 288, 289, 1012, 1019, 1546; 26 U.S.C. 7206, 7207; and 42 U.S.C. 408, 1395nn. Nonetheless, the courts of appeals have uniformly concluded as a matter of statutory interpretation and constitutional law that a defendant may be prosecuted and sentenced under any of the overlapping provisions. See, *e.g.*, *United States* v. *Gordon*, 548 F.2d 743 (8th Cir. 1977); *United States* v. *Radetsky*, 535 F.2d 556, 567-568 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Smith*, 523 F.2d 771, 780 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States* v. *Matanky*, 482 F.2d 1319 (9th Cir.), cert. denied, 414 U.S. 1039 (1973); *United States* v. *Eisenmann*, 396 F.2d 565, 567-568 (2d Cir. 1968). See also *United States* v. *Gilliland*, *supra*.

Analogous overlaps characterized by different potential punishments abound throughout the United States Code. Thus, perjury before a court may violate both 18 U.S.C. 1621(1) and 1623(a). Bribery using the mails may violate both 18 U.S.C. 1341 and 1952. *E.g.*, *United States* v. *Hall*,

Moreover, the major premise of the court of appeals' analysis concerning the identity of elements between Sections 922(h) and 1202(a) is incorrect. While we believe that the Due Process Clause would not bar Congress from enacting two statutes that word for word prohibit the same conduct but nevertheless have different punishment provisions,[24] that issue is not even posed here. Sections 922(h) and 1202(a) are far from identical, even though with regard to the instant case the government's proof sufficed to establish a violation of both provisions. As we have shown in point I(A)(2), *supra*, each statute covers different categories of individuals and prohibits different kinds of conduct, and the requisites for proving the offenses are somewhat different even in the case of the receipt of firearms by convicted felons. See pages 19-21, *supra*.

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536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976). The willful filing of a false tax return constitutes both a felony (26 U.S.C. 7206) and a misdemeanor (26 U.S.C. 7207). See *United States* v. *Bishop*, 412 U.S. 346 (1973); *Berra* v. *United States*, 351 U.S. 131 (1956); see also *Sansone* v. *United States*, 380 U.S. 343 (1965); *United States* v. *Beacon Brass Co.*, 344 U.S. 43 (1952); *United States* v. *Noveck*, 273 U.S. 202 (1927). There are many other examples too numerous to list.

[24] See, *e.g.*, *United States* v. *Jones*, 527 F.2d 817, 820 (D.C. Cir. 1975); *United States* v. *Smith*, *supra*; *People* v. *Eboli*, 34 N.Y. 2d 281, 313 N.E. 2d 746 (1974); *People* v. *McCollough*, 57 Ill. 2d 440, 313 N.E. 2d 462 (1974); cf. *Bell* v. *United States*, *supra*, 349 U.S. at 82.

B. The Prosecutor's Discretion To Charge Cases Such As Respondent's Under Either Section 922(h) Or Section 1202(a) Does Not Violate The Constitution

The court of appeals suggested (Pet. App. 10a-12a) that the overlap of Sections 922(h) and 1202(a) raises questions of excessive prosecutorial discretion. However, as this Court has recently reiterated, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) (footnote omitted). See *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Rosenberg* v. *United States*, 346 U.S. 273, 294 (1953) (Clark, J., concurring) (opinion joined by five other members of the Court); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). Thus it is well settled that unless the exercise of discretion is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962), quoted with approval in *Bordenkircher* v. *Hayes*, *supra*. Accord, *United States* v. *Bell*, 506 F.2d 207, 221-222 (D.C. Cir. 1974). See generally Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103 (1961). Neither the

court of appeals nor respondent has suggested that this prosecution was based on improper factors.

Underlying the pronounced judicial deference to prosecutorial decisions regarding the selection and institution of charges is the constitutional doctrine of separation of powers. See, *e.g.*, *United States* v. *Nixon*, *supra*; *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375, 379-380 (2d Cir. 1973); *United States* v. *Bland*, 472 F.2d 1329, 1335 (D.C. Cir. 1972); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). Article II, Section 3 of the Constitution charges the Executive Branch with the duty to "take Care that the Laws be faithfully executed * * *." The Attorney General, on behalf of the President, has the specific obligation to enforce the federal criminal laws. 28 U.S.C. 515, 516. These provisions strongly suggest the inappropriateness of judicial review of the government's prosecutorial decisions, except upon some showing that the decisional process was tainted by unconstitutional factors.

Furthermore, judicial deference in this area reflects the reality that "the manifold imponderables which enter into the prosecutor's decision to prosecute or not to prosecute make the choice not readily amenable to judicial supervision." *Inmates of Attica Correctional Facility* v. *Rockefeller*, *supra*, 477 F.2d at 380. In deciding whether to prosecute and what violations to charge, the prosecutor properly considers a plethora of factors, including allocation of prosecutorial re-

sources,[25] the strength of the case,[26] and the justice and urgency of prosecution in particular cases.[27] As

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[25] *E.g.*, *Smith* v. *United States*, 375 F.2d 243, 247 (5th Cir. 1967); Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. Cal. L. Rev. 12, 21-23 (1972); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103, 1119 (1961). An evaluation of prosecutorial resources involves whether a particular individual is more properly prosecuted by state rather than federal authorities, as well as whether the individual warrants prosecution at all. See Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 Law & Contemp. Prob. 64 (1948).

[26] Rosett, *supra* note 25, at 21; Comment, *supra* note 25, at 1119; Schwartz, *supra* note 25, at 84.

[27] Prosecutorial discretion is necessary both to evaluate the cases most appropriate for immediate prosecution because of the wanton disregard for societal values evidenced by a particular defendant, and to alleviate harshness and render rough justice for defendants whose conduct falls on the less censurable end of the spectrum of wrongdoing. See Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427-432 (1960); Schwartz, *supra* note 25, at 84; Rosett, *supra* note 25, at 25. The ABA Project on Standards for Criminal Justice, *The Prosecution Function and the Defense Function* § 3.9 (Approved Draft 1971), summarizes the various considerations as follows:

> (a) In addressing himself to the decision whether to charge, the prosecutor should first determine whether there is evidence which would support a conviction.
>
> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

Mr. Chief Justice (then Judge) Burger has observed (*Newman* v. *United States*, 382 F.2d 479, 480 (D.C. Cir. 1967)): "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."

In light of the well established and wide ranging discretion of prosecutors in matters relating to the charging decision, the court of appeals' concern about the constitutionality of the prosecutor's discretion to choose between the two statutes in this case is without substance. The Constitution is not offended by the power of the Executive to decide whether to prosecute a case or to forego prosecution altogether. See *Inmates of Attica Correctional Facility* v. *Rockefeller, supra; United States* v. *Cox, supra.* Similarly, the prosecutor, consistent with due process of law, has untrammeled power to charge a greater offense rather than a lesser degree of that offense, or vice versa. See

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(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) prolonged non-enforcement of a statute, with community acquiescence;

(vi) reluctance of the victim to testify;

(vii) cooperation of the accused in the apprehension or conviction of others;

(viii) availability and likelihood of prosecution by another jurisdiction.

* * * * *

Newman v. *United States, supra*, 382 F.2d at 481 & n.5. Indeed, when faced with evidence that several individuals are involved in an offense, the prosecutor may constitutionally charge some but not others or charge different degrees of that offense against different individuals. *Id.* at 481-482; *United States* v. *Bell*, 506 F.2d 207, 221-222 (D.C. Cir. 1974). Nor does the Constitution limit the prosecutor's power to charge an individual with all or some lesser number of the offenses he has allegedly committed or, during the course of plea bargaining, to drop or threaten to add charges. See *Bordenkircher* v. *Hayes, supra.* So long as the prosecutor does not base his decisions on invidiously discriminatory grounds, the exercise of his broad discretion over the various aspects of the charging decision will not violate the Constitution.[28]

The foregoing enumeration of prosecutorial powers illustrates what this Court has previously made clear: Our constitutional system allows a prosecutor to select between two statutes, applicable to the same conduct but carrying different penalties. See, *e.g.*,

---

[28] Respondent had many prior convictions, including one for murder in 1960 (A. 11-13). Following that offense, he served approximately 13 years of his 25-year sentence. Within two years of his release, he was openly selling illicit firearms and boasting that the government was unaware of his activities (Tr. 60-67). Although the prosecutor's decision to indict respondent under Section 922(h) is not subject to judicial review in the absence of a showing that his decision was improperly motivated, we suggest that the foregoing circumstances of respondent's offense undoubtedly prompted the government's election in this case, as well as the district court's decision to impose a five-year sentence.

ibid.; *United States* v. *Nixon*, *supra*; *Rosenberg* v. *United States*, *supra*; *United States* v. *Beacon Brass Co.*, *supra*. The court of appeals' contrary conclusion relies primarily on Mr. Justice Black's dissent in *Berra* v. *United States*, 351 U.S. 131, 135-140 (1956) (Pet. App. 9a-10a). But Mr. Justice Black premised his observations on the existence of two identical statutes carrying different maximum penalties. 351 U.S. at 139. And here, as we have previously established, Sections 922(h) and 1202(a) are far from identical. See point I(A)(2), *supra*.[29] Moreover, even if those two gun law provisions were identical, neither logic nor precedent supports Justice Black's position. See, *e.g.*, *United States* v. *Jones*, 527 F.2d 817, 820 (D.C. Cir. 1975); *United States* v. *Smith*, 523 F.2d 771, 780 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976); *United States* v. *Librach*, 520 F.2d 550, 556 (8th Cir. 1975), cert. denied, 429 U.S. 939 (1976); *Hutcherson* v. *United States*, 345 F.2d 964, 967 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965); *id.* at 969 (Burger, J., concurring); *People* v. *Eboli*, 34 N.Y. 2d 281, 313 N.E. 2d 746 (1974); *People* v. *McCollough*, 57 Ill. 2d 440, 313 N.E. 2d 462 (1974). Cf. *Spies* v. *United States*, 317 U.S. 492, 497 (1943)

[29] In *Berra*, a majority of the Court construed two sections of the Internal Revenue Code of 1939 to cover "precisely the same ground" despite the difference in penalties applicable to the two sections. 351 U.S. at 134. The Court did not, however, reach any questions concerning the constitutionality of sentencing the defendant under the felony provision rather than the misdemeanor statute.

(indicating that identical statutes might be "unusual" but not unconstitutional).[30]

C. Section 924(a) Does Not Constitute An Unconstitutional Delegation Of Congress' Duty To Affix Punishment

Finally, the court of appeals indicated (Pet. App. 10a-11a) that the overlap between Sections 922(h)

[30] It is not readily apparent why the prosecutorial discretion incident to the existence of identical statutes with different penalty provisions differs, for purposes of constitutional analysis, from the firmly established prosecutorial discretion to choose one criminal statute over another even though the government's proof in a particular case would be identical. For example in *Rosenberg* v. *United States*, *supra*, Mr. Justice Clark, on behalf of six members of the Court, stated that the government could constitutionally prosecute a defendant under the Espionage Act of 1917 rather than the Atomic Energy Act of 1946, even though the government's proof and the elements of the crime would be the same with regard to a defendant whose espionage concerned atomic secrets. And at issue in that case was the trial court's unilateral imposition of the death penalty under the Espionage Act—a penalty not available under the Atomic Energy Act without a recommendation of the jury based upon specific additional findings.

Furthermore, the existence of Section 1202(a) inures to the benefit of defendants generally. If Congress had enacted Section 922(h) alone, as it originally intended, the prosecutor unquestionably could choose to prosecute, thereby subjecting a defendant to five years' imprisonment. That the prosecutor actually has the option to proceed under Section 1202(a) can only reduce some defendants' potential liability insofar as they would otherwise be subject to five years' imprisonment. (It is implausible that a prosecutor who decided to prosecute under Section 1202(a) would not have prosecuted at all if only Section 922(h) existed.) Of course, the trial court retains the power to give a sentence of two years or less under either statute.

and 1202(a) somehow may amount to an unconstitutional delegation to the Executive Branch of Congress' responsibility to establish penalties for violations of the criminal laws. Initially we note that this point does not appear to differ in essence from the court's concern about excessive prosecutorial discretion. In any event, whatever vitality the doctrine of unconstitutional delegation may currently retain (see generally McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-1130 (1977)), it is certainly not applicable here. Section 922(h) unquestionably prohibited respondent from receiving a firearm that had traveled in interstate commerce, and Section 924(a) explicitly sets forth the range of penalties deemed by Congress to be appropriate for violations of Section 922(h).[31] In short, Congress properly and expressly exercised its power to define criminal activity and to affix punishment therefor; it did not leave the courts to guess at either the conduct prohibited or the appropriate range of penalties. Compare *United States* v. *Evans*, 333 U.S. 483 (1948).[32]

If anything, it is the court of appeals' decision, and not the overlap between Sections 922(h) and 1202(a), that raises serious questions concerning the appropriate roles of the coordinate branches of govern-

[31] At the same time, Section 1202(a) defines a separate, albeit similar, crime and the applicable punishment.

[32] Respondent does not contend that the five-year maximum penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment.

ment. The unwarranted reconstruction of the federal gun laws effected by the court below substantially trenches upon Congress' broad discretion to enact criminal laws and to affix the appropriate range of punishments. See, *e.g.*, *Bell* v. *United States*, *supra*, 349 U.S. at 82. In addition, insofar as the decision calls into question the prosecutor's traditional discretion to charge one crime rather than another, it infringes the Executive's constitutional duty to enforce the laws. Congress has specified that violations of Section 922(h) are punishable by up to five years' imprisonment, and the federal prosecutor properly decided to proceed against respondent under Section 922(h). Following conviction, the district court determined that it was appropriate to sentence respondent to five years' imprisonment in light of respondent's history and the circumstances of the offense. See note 28, *supra*. There is no justification for the court of appeals' interference with these wholly appropriate exercises of power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ANDREW J. LEVANDER
Assistant to the Solicitor General

SIDNEY GLAZER
FRANK J. MARINE
Attorneys

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FOR ARGUMENT

No. 78-776

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,

Petitioner,

vs.

MILTON DEAN BATCHELDER,

Respondent.

BRIEF OF RESPONDENT

CHARLES A. BELLOWS
JASON E. BELLOWS
CAROLE K. BELLOWS
One IBM Plaza, Suite 1414
Chicago, IL 60611
Attorneys for Respondent

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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NO. 78-776

UNITED STATES OF AMERICA,

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Respondent.

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Where 18 U.S.C. §922(h) and §1202(a) are vague and inconsistent in that they provide a different punishment for the same offense and thereby raise a serious doubt of constitutionality of tha statutes, may the court apply the rule of lenity?

2. Whether U.S.C. §922(h) and §1202(a) are void for vagueness under the Fifth Amendment and violate the due process and equal protection of the law for permitting the prosecution to choose whether to charge the Respondent under Section 1202(a) calling for a more severe sentence?

3. Whether §1202(a) is an implied repeal of §922(h)?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

* * *

3. 18 U.S.C. 922(h) provides:

> It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. 18 U.S.C. 924(a) provides in pertinent part:

> Whoever violates any provision of this chapter * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both, * * *.

5. 18 U.S.C. App. 1202(a) provides:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or

> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

SUMMARY OF ARGUMENT

Sections 922(h) and 1202(a) providing for different punishments for the same offense are void for vagueness under the Fifth Amendment. The Court of Appeals tried to avoid holding both sections unconstitutional and gave a constitutioned reading to the ambiguity by requiring that the Respondent be sentenced to a lessor sentence under Section 1202(a). Also the unfettered discretion by the prosecutor to choose to try the Respondent under Section 922(h) which carries a greater punishment violates the Respondent's right to due process and equal protection of the law. The government argues that it is within its discretion to select one or more charges from the federal criminal offenses. This is not the issue. A single act may violate one or more statutes, each requiring different element of proof. In the instant case the offense requires identical proof and subjects the offender to two different penalties.

Senator Long's amendment to the Omnibus Crime Control and Safe Acts was intended to replace Section 922(h). Section 1202(a) is directed to a larger group considered dangerous. From the meager discussion at the time the amendment was offered, we submit that Senator Long intended to replace 922(h) by 1202(a).

I.

18 U.S.C. SECTION 922(h) AND SECTION 1202 ARE VAGUE AND INCONSISTENT IN THAT THEY PROVIDE A DIFFERENT PUNISHMENT FOR THE SAME OFFENSE AND THEREBY RAISE A SERIOUS DOUBT OF CONSTITUTIONALITY OF THE STATUTES, THE COURT MAY APPLY THE RULE OF LENITY.

Respondent was convicted for violation of Title 18, United States Code, §922(h), for receiving a firearm which had previously been shipped in interstate commerce, defendant having been convicted of a crime punishable by imprisonment for a term exceeding one year.

Section 922(h)(1) proscribes the "receipt" of a firearm by "any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . . ." The maximum penalty for a violation of §922(h) is incarceration for a period of five years and/or the imposition of a fine of $5,000. (18 U.S.C. §924(a)).

Similarly, Title 18, United States Code, §1202(a) also proscribes the "receipt" of a firearm by "any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony. . . ." Section 1202(a) provides that a violation of the section carries with it a maximum sentence of incarceration of two years and/or a fine of $10,000.

The Court of Appeals found that both sections under consideration presented serious questions of the constitutionality of the statutes. The Court of Appeals enunciated their principles: (1) the principle of lenity; (2) the principle that a later enacted statute can under circumstances serve as an implied repeal of an earlier statute; and (3) that when a serious doubt of constitutionality is raised a court will first ascertain whether a construction of the statute is fairly possible by which the question can be avoided. The Court of Appeals applied the rule of lenity.

The Court said:

> "Because we therefore find the reasoning of other circuits cited by the Government to be inapplicable, we decline to follow those cases here and are left with serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct. Fortunately we need not reach a final conclusion on these difficult constitutional questions because, having found a possible ambiguity when the Omnibus Act is read as a whole, we can give the Act a clearly constitutional reading by requiring that defendant's sentencing be governed by Section 1202(a)."

Much of the government's brief relates to explaining to this court that the Court of Appeals was in error in the case because there was no ambiguity in the statutes. The government argues that the word "five" in §922(h) is not ambiguous and how could it be construed to mean "two". But this is not the case here. The government strains its reasoning and misses the point of this case. We do not contend that the words contained in each section have an ambiguous meaning. The crux of the case is not whether the words "five" or "two" by themselves are ambiguous, but rather that the sections in the Act which provide for two different penalties for the same offense are void for vagueness under the Fifth Amendment.

The overlap of several sections of the federal gun control laws has been recognized and clarified by recent decisions of the Supreme Court. In *United States* v. *Bass*, 404 U.S. 336 (1971), the court recognized that there is some overlap between Title IV, of which §922(h) is a part, and

Title VII, of which §1202(a) is a part, of the Omnibus Crime Control and Safe Streets Act of 1968. 404 U.S. at 342-343. *See also United States* v. *Craven,* 478 F. 2d 1329, 1336, n. 5 (6th Cir.), cert. denied, 414 U.S. 866 (1973).

It is submitted that under the particular circumstances of the instant cause, wherein the conduct of the Respondent is proscribed by the two aforementioned felony statutes, both statutes may be void for vagueness under the Fifth Amendment.

In *Berra* v. *United States,* 351 U.S. 131, 135 (1956) Justice Black in his dissenting opinion said:

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same."

In permitting Sections 922(h) and 1202(a)(1) to coexist, Congress has abdicated this function and has left to the United States Attorney a free choice, without any standards or criteria to govern his discretion, as to whether a person previously convicted of a felony and in receipt of a firearm should be indicted under a statute carrying a maximum sentence of two years or under one carrying a maximum sentence of five years. Not surprisingly, the United States Attorney has chosen to indict the Respondent under the statute accompanied by the higher maximum sentence. Respondent respectfully submits that this unfettered discretion resulting from the coexistence of these two overlapping statutes violates the principle of separation of powers and that the instant indictment under §922(h) violates Respondent's right to due process and equal protection of the law because he is being subjected to a higher possible penalty for the same conduct as a person charged under §1202(a)(1) for no rational reason.

The Government agrees that both §922 and §1202 proscribe identical conduct as they relate to possession of firearms by felons. The government argues that it has discretion to proceed under either statute, absent a showing of an abuse of that discretion. The Government also argues that it is within its discretion to proceed to charge a felony, a lesser offense or not to charge at all and that if it does decide to charge, it may select one or more charges from the federal criminal statutes, since one act may violate several statutes.

The issue in the present case is not the same. A single act may violate one or more statutes, each requiring different elements of proof, *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932); and that in some instances the commission of one crime merges into another committed by the same act and separate sentences cannot be imposed. *Heflin* v. *United States,* 365 U.S. 415 (1959); *Milanovich* v. *United States,* 365 U.S. 551 (1961); *United States* v. *Gaddis,* 424 U.S. 544 (1976); *United States* v. *Seals,* 545 F. 2d 26 (7th Cir., 1976).

In the instant case the offense requires identical proof and subjects the offender to two different penalties. The problem is further compounded by the fact that both statutes are contained in separate titles of the *same Act.*

The Court of Appeals in the instant case said:

> "It is our conclusion that at best Congress would have no more power to delegate the selection of punishment to the Attorney General than it does to the courts or to administrative agencies. Because this statutory scheme, if interpreted to give meaning both to Section 922 and 1202, would affix two separate and inconsistent punishments rather than one scheme of punishment (compare *United States* v. *Evans,* 333 U.S. 483), we have serious doubts about the constitutionality of that construction. See *Berra* v. *United States,* 351 U.S. 131, 139-140 (Black, J. dissenting).

Justice Black stated at pages 139-140:

> A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. The basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.
>
> • • •
>
> The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same. It is true that there may be differences due to different appraisals given the circumstances of different cases by different judges and juries. But in these cases the discretion in regard to conviction and punishment for crime is exercised by the judge and jury in their constitutional capacities in the administration of justice.

Batchelder was prosecuted under 18 U.S.C. §922(h) for precisely the same conduct which would have supported a conviction under 18 U.S.C. §1202. Batchelder's prosecution under 18 U.S.C. §922(h) violated his rights to due process of law, as he was the victim of discriminatory conduct by the Government. The Government's unfettered discretion to determine under which statute to prosecute violated both his rights to due process of law, and equal protection of the laws. *Berra* v. *United States,* 351 U.S. 131 (1956) (BLACK, J., dissenting).

II.

18 U.S.C. SECTION 922(h) AND SECTION 1202(a) ARE UNCONSTITUTIONAL FOR BEING VAGUE AND AMBIGUOUS UNDER THE FIFTH AMENDMENT AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

The Court of Appeals expressed a serious doubt of the constitutionality of both sections because of vagueness under the Fifth Amendment, and a violation of the protection under due process and equal protection of the law. (See argument under point I). There are serious doubts of the constitutionality of the two statutes. To permit these statutes to remain in their present form will bring to the courts new problems of construction. The vagueness and ambiguity arising from the two sections covering different punishments for the same offense requires that they be held unconstitutional.

III.

SECTION 922(h) WAS REPEALED BY SECTION 1202(a).

It is our position that Senator Long intended that his last minute Amendment was to replace §922(h). After the Omnibus Crime Control and Safe Streets Act of 1968 was passed Section 1202 was a last minute amendment. See generally *Stevens* v. *United States,* 440 F. 2d 144 (6th Cir. 1971). After the Act had passed the House and had been reported to the Senate by the Senate Committee on the Judiciary, on the day the Senate version of the Act passed the Senate, Section 1202 was offered from the floor as an amendment by Senator Long. 114 Congressional Record 14775. No specific mention was made of Section 922. Senator Dodd asked whether Senator Long's amendment was

a substitute for Title IV and Senator Long replied "This amendment would take nothing from the bill . . ." In explaining Senator Long's amendment to the House, Congressman Machen said that "this provision is necessary to a coordinated attack on crime and also [is] a good complement to the gun control legislation contained in Title IV." The Court of Appeals in its discussion of the passage of the bill said:

> "This brief legislative history leaves a perplexing problem of statutory construction. While it could be argued that the legislators' comments indicate that Congress intended the two titles to coexist, it is hard to imagine, and nothing in the history suggests, that the legislators if they were focusing upon these Sections could have considered Section 1202 a "good complement" to Section 922."

Title IV concerns itself with four categories: (1) persons under indictment or having been convicted of a crime punishable by imprisonment for a term exceeding one year; (2) fugitives from justice; (3) addicts and unlawful users of various controlled substances; and (4) mentally incompetents. Section 1202(a) directs itself to five categories: (1) convicted felons; (2) persons dishonorably discharged from the Armed Services; (3) persons who have renounced their American citizenship; and (4) illegal aliens. Section 1202(a) imposed a disability on three groups that are not covered by Section 922(h).

It is our position that Senator Long considered his amendment broader and more effective than that contained in 922(h) and that it would be a substitute for 922(h). A later enacted statute can under certain circumstances serve as an implied repeal of an earlier statute. We recognize that implied repeals are disfavored but we submit that Senator Long's brief statement when he offered the amendment was intended to indicate that he intended to replace 922(h) by 1202(a).

CONCLUSION

The judgment of the Court of Appeals should be affirmed or in the alternative that the Sections 922(h) and 1202(a) be declared unconstitutional or that this court hold that Section 922(h) is repeated by Section 1202(a).

Respectfully submitted,

CHARLES A. BELLOWS
JASON E. BELLOWS
CAROLE K. BELLOWS
Attorneys for Respondent